

*United States Court of Appeals
for the Second Circuit*



APPENDIX

NO. 74-2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLAUDIA FROST, ET AL

Plaintiffs-Appellees

v.

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

NO. 221974

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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AT&T

For Plaintiff: SUBAP SINGH
115 No. Main Street
Freeport, New York
(516) 368-6707

For Defendant: U.S. ATTY.
For pltf: Monroe Co.
Legal Assistance Ctr.
80 West Main Street
Rochester, N.Y. 1461

Basis of

CASPAR WEINBERGER, as Secretary of the
United States Department of Health,
Education and Welfare,

TORY

JURY TE

ON

ABSTRACT OF COSTS

RECEIPTS, REMARKS, ETC.

CLAUDIA FROST VS. CASPER WETHEBERGER

1/14/73	Complaint filed. Summons issued.	1 JSS
1-25-73	Summons returned & filed./Executed.	2
0-16-73	Notice of motion ret. 11-2-73 for a preliminary injunction or a temporary restraining order and memorandum of law in support of motion filed.	3/4
11/2/73	Before TRAVIA, J.- Case called- Motion for a preliminary injunction argued-Submit Order.	
11-9-73	Amended complaint filed.	5
11-13-73	By TRAVIA, J. - Order dtd 11-12-73 denying motion for a T.R.O., that an administrative hearing be held within one month, and that deft's time to answer is extended to 12-21-73 filed.	6
11/21/73	Notice of Motion, ret. 11/30/73 filed re: for an order determining that this action be maintained as a class action, with Memorandum of Law in Support filed.	7/8
11-23-73	Pltf's reply memorandum of law in support of motion for temporary restraining order and preliminary injunction	9
11-29-73	Pltffs' supplemental memorandum of law in support of class action motion filed.	10
11/30/73	Before TRAVIA, J.- Case called- Adj'd to 12/28/73	
12-13-73	Affadavit and memorandum in opposition to motion for maintenance of action as class action	11-12
12-26-73	Pltffs' reply memorandum and affidavit in support of class action motion filed.	13/14
12-28-73	ANSWER filed.	15
12-28-73	Before TRAVIA, J. - Case called for hearing on deft's motion for an order determining this as a class action. Motion argued & adj'd to 3-8-74 for all purposes.	
2/1/74	Notice of Motion, ret. 3/8/74 filed re: deft's motion for summary judgment and Memorandum in Support of Deft's motion for summary judgment filed.	16/17
2/1/74	Statement of deft pursuant to Local Rule 9(g) filed.	18
2/4/74	Memorandum of Law in Support of Pltff's Motion for Summary Judgment filed, with Notice of Motion , ret. 3/8/74 filed re: for an order granting summary judgment (Motion by pltff's)	19/20
2/25/74	Affidavit of Susan Savitt filed re: in opposition to the deft's motion for summary judgment	21
2/25/74	Pltff's Response to deft's 9(g) statement filed.	22
2/25/74	Pltff's Memo in Oppos. to Deft's motion for summary judge. filed.	23

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DATE	DESCRIPTION	COURT	
		NUMBER	PERIOD
2-26-74	Notice of motion and memorandum of law granting T.R.O. in favor of pltff ret 3-8-74 at 10 A.M. filed.		24/25
3/4/74	Pltff's supplemental memorandum in opposition to deft's motion for summary judgment filed.		26
3-8-74	Before TRAVIA, J. - Case called for hearing on pltff's motion for a T.R.O. - Motion argued. Decision reserved. Pltff's motion for summary judgment filed. Decision reserved. Deft's motion for summary judgment and class action determination argued. Decision reserved. - Govt's brief by 3-13-74. Deft's brief by 3-20-74.		
3-8-74	Notice of change of address for pltff filed.		27
3/18/74	Pltff's Post Argument Memorandum filed		28
5-3-74	By TRAVIA, J. - Decision and order dtd 5-3-74 granting pltffs' motion declaring this a class action, denying pltffs' application for injunction, denying deft's motion for summary judgment, granting pltffs' motion declaring existing procedures of Social Security Administration to be violative of procedural due process, and directing deft to adopt new procedures filed. Slight order. (p/c mailed to attys).		29
5-28-74	By TRAVIA, J. - ORDER & JUDGMENT dtd 5-28-74 declaring case to be a class action & directing deft to adopt new procedures, etc filed. (p/c mailed to attys).		30
6-14-74	Notice of motion for an order to amend judgment ret. 6-28-74 @ 10:00 A.M. and memorandum of law filed.		31/32
6-24-74	Affidavit of Rene H. Raixach and memorandum of law in opposition to deft's motion to amend judgment filed.		33/34
6-28-74	Before TRAVIA, J. - Case called for hearing on deft's motion to amend judgment. Motion denied.		
7-2-74	By TRAVIA, J. - Order dtd 7-1-74 denying motion to amend judgment filed. (p/c mailed to attys)		35
7-17-74	Notice of appeal filed. Copy sent to C of A. JM		36
8-26-74	Record on appeal certified and handed to Lloyd H. Baker for delivery to C of A.		
8/30/74	Acknowledgment recd and filed from the C. of A. for receipt of Index to Record on Appeal filed.		37

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, individually and as the next friend of JAMES FROST and KRISTEN FROST, minors, and as representatives of a class of all persons who are now or may in the future be entitled to receive survivors' benefits under the Social Security Act whose benefits have been or may be reduced without a prior hearing,

AMENDED
COMPLAINT
CLASS ACTION

Plaintiffs, Civil Action
No. 73C 1383

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,

Defendant.

JURISDICTION

1. Jurisdiction of the court is invoked pursuant to 28 U.S.C. section 1331 and section 1331, and 5 U.S.C. sections 702-704. The amount in controversy exceeds ten thousand dollars (\$10,000) exclusive of interest and costs. The action seeks to compel the defendant officer of the United States to perform a duty owed to plaintiffs, namely to conduct a hearing prior to reducing plaintiffs' survivors' benefits under the Social Security Act, 42 U.S.C. section 401 et seq. (hereinafter the "Act"). Plaintiffs seek mandatory injunctive relief and a declaratory judgment pursuant to 28 U.S.C. sections 2201 and 2202 and Rule 57, F.R.C.P. as they have no adequate remedy at law.

2. Plaintiff CLAUDIA FROST is a resident of Baldwin, New York, within the Eastern District of New York. She is the mother of the plaintiffs JAMES FROST, age 8, and KRISTEN FROST, age 9, who reside with her, and on whose behalf plaintiff CLAUDIA FROST brings this action as their next friend.

DEFENDANT

3. Defendant CASPAR WEINBERGER is the Secretary of the United States Department of Health, Education and Welfare. He is responsible for making rules and regulations and establishing procedures which are necessary or appropriate to carry out the provisions of the Act and adopting reasonable and proper rules and regulations to regulate and provide for the extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits under the Act pursuant to 42 U.S.C. section 405(a). Defendant is also responsible for holding such hearings as are necessary and proper for the administration of the Act under 42 U.S.C. section 405(b).

CLASS ACTION

4. Plaintiffs bring this action individually and as representatives of all persons who are now or may in the future be entitled to receive survivors' benefits under the Act whose benefits have been or may be reduced without a prior hearing.

5. The class is so numerous that joinder of all members as parties is impracticable; there are questions of law or fact common to the class; the claims of the representatives of the class are typical of the claims of the class; the representatives of the class will fairly and adequately protect the interests of the class; the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and/or declaratory relief with respect to the class as a whole; the questions of law common to the members of the class predominate over any questions affecting only individual members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FACTS

6. CHARLES FROST, JR., who held Social Security account number 065-34-1082, was the husband of the plaintiff CLAUDIA FROST and the father of the plaintiffs JAMES FROST and KRISTEN FROST.

7. CHARLES FROST, JR. died on August 21, 1968. At the time of his death CHARLES FROST, JR. was fully insured under the Act, within the meaning of 42 U.S.C. section 414(a).

8. In or about 1968 the plaintiffs began receiving payments from the Social Security Administration of the United States Department of Health, Education and Welfare, as survivors of CHARLES FROST, JR., pursuant to 42 U.S.C. section 402(b)(1)(B), 42 U.S.C. section 402(b)(2), and 42 U.S.C. section 402(g)(1) in the case of the plaintiff CLAUDIA FROST and 42 U.S.C. section 402(d)(1)-(2) in the case of the plaintiffs JAMES FROST and KRISTEN FROST.

9. Prior to February 15, 1973, each plaintiff was receiving said survivors' benefits in the amount of \$159.30 per month.

10. While receiving \$159.30 per month for herself and two of her children, plaintiff CLAUDIA FROST was also in receipt of \$121.00 per month plus medicaid and food stamps from the Nassau County Department of Social Services as grantee for KIMBERLY FROST, age 2, who is not eligible for social security benefits. The total budget for the family of four was \$598.90.

11. On or about February 15, 1973, plaintiff CLAUDIA FROST was notified by the Social Security Administration that

each of the plaintiffs' grants would be reduced to \$95.70 per month because two more children were now entitled to benefits, in accordance with the maximum total benefits limitation under 42 U.S.C. section 403(a).

12. When plaintiffs' social security funds were summarily reduced to \$95.70 per month for each individual in May, 1973, the Nassau County Department of Social Services still continued the grant to KIMBERLY FROST at the previous level of \$121.00, causing the total budget of the family to drop to \$408.10 or \$190.80 less per month than before the May reduction. Despite this drastic reduction in cash grants, KIMBERLY FROST is still the only family member entitled to food stamps and medicaid benefits.

13. The two additional children who were determined to be entitled to benefits were persons apparently known to the Social Security Administration as CHARLES E. FROST and TINA L. FROST. They were not known to any of the plaintiffs.

14. Said CHARLES E. FROST and TINA L. FROST are claimed by the Social Security Administration to have been born out of wedlock to CHARLES FROST, JR. and LOLA COOLIDGE in upstate New York where the decedent had last worked before his death. Upon information and belief, TINA L. FROST was born after decedent's death.

15. Upon information and belief, said LOLA COOLIDGE and CHARLES E. FROST and TINA L. FROST were known to the Social Security Administration and claiming to be entitled to share in the survivors' benefits of CHARLES FROST, JR. as early as August, 1969.

16. At no point between the time the Social Security Administration first learned of the claim of CHARLES E. FROST

and TINA L. FROST and the time plaintiffs were advised of the Social Security Administration's determination to reduce their social security benefits did the Social Security Administration notify plaintiffs of the existence of CHARLES E. FROST and TINA L. FROST, or their claims, or in fact confront plaintiffs with any evidence which had been presented in support of these claims.

17. When advised of the determination to reduce the family's social security benefits in February, 1973, plaintiff CLAUDIA FROST, acting on behalf of herself and her children, the other-named plaintiffs herein, went to the offices of the Social Security Administration in Freeport, New York to protest this determination and express her shock concerning the claim that her husband fathered out of wedlock children.

18. Plaintiff CLAUDIA FROST was there orally advised to file a request for reconsideration of this decision and to present any evidence she might have to rebut the determination of the Administration concerning CHARLES E. FROST and TINA L. FROST. Plaintiff CLAUDIA FROST had no knowledge of the evidence upon which the Social Security Administration had determined that CHARLES E. FROST and TINA L. FROST were entitled to share in her deceased husband's survivors' benefits. She repeatedly requested that the Social Security Administration advise her of the evidence which underlay the claims of CHARLES E. FROST and TINA L. FROST so that she might defend her position against their claim.

19. The Social Security Administration refused said demand to advise plaintiff CLAUDIA FROST of the evidence on which the determination had been made.

20. Thereupon plaintiff CLAUDIA FROST orally advised an employee of the Social Security Administration of her position, stating that without further information provided by the Social

Security Administration she could only offer as her case her firm denial that her husband fathered no children other than her own. Said employee assisted plaintiff in preparing a request for reconsideration. Plaintiff CLAUDIA FROST had no benefit of counsel when filing the reconsideration request.

21. Plaintiffs were never advised in writing of any right to request a pre-reduction hearing; how to obtain such a hearing; of their right to confront and cross-examine witnesses against them; or of their right to examine documents and records to be used at such hearing at a reasonable time prior to and during such hearing.

22. In May, 1973 plaintiff CLAUDIA FROST received a notice of reconsideration determination that the original decision of the Social Security Administration reducing the benefits to her and to JAMES FROST and KRISTEN FROST was correct. Copies of that reconsideration determination and transmittal letter are annexed hereto.

23. On or about May 16, 1973 plaintiff CLAUDIA FROST requested a hearing before a hearing examiner as set forth in the aforesaid transmittal letter. To date, no notice scheduling any such hearing has been given to the plaintiffs.

24. Commencing with the May, 1973 check sent by the Social Security Administration to plaintiff CLAUDIA FROST and received by her on or about June 3, 1973, plaintiffs' benefits were reduced in accordance with the aforesaid findings of the Social Security Administration.

FIRST STATEMENT OF CLAIM

25. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 24 herein.

26. The reduction in plaintiffs' benefits without a prior hearing, without notice of the evidence relied on by the Social Security Administration, without the right to confront witnesses and cross-examine, and with the burden placed on defendants to prove facts establishing entitlement to full benefits without notice of evidence, witnesses and information relied on by the Social Security Administration violates plaintiffs' rights to the due process of laws guaranteed by the Fifth Amendment to the Constitution of the United States.

SECOND STATEMENT OF CLAIM

27. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 26 herein.

28. Defendant's failure to make rules and regulations and establish procedures for a prior hearing in cases such as that of plaintiffs is in violation of a duty owed to plaintiffs under the Fifth Amendment to the Constitution of the United States and 42 U.S.C. sections 405(a) and (b).

THIRD STATEMENT OF CLAIM

29. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 28 herein.

30. Defendant is liable to plaintiffs for all sums by which plaintiffs' benefits have been reduced without a prior hearing.

WHEREFORE, plaintiffs demand:

1. A declaratory judgment that the reduction of benefits to the plaintiffs and the members of the class represented by them prior to a hearing violates their rights to the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

2. A declaratory judgment establishing the minimum standards for any hearing required to be given prior to any reductions of benefits to the plaintiffs and the members of the class represented by them, including but not limited to:

(a) Prior notice in writing of the initial determination of the right to request a pre-reduction hearing, of how to obtain such a hearing, of the right to be represented by counsel at such hearing, of the right to confront and cross-examine witnesses, and of the right to examine documents and records to be used at such hearing at a reasonable time prior to and during such hearing.

(b) The deferral of the effective date of any reduction pending the decision in such hearing.

3. A mandatory permanent injunction ordering defendant, his successors in office, agents and employees, to establish the mechanism for providing such hearings, for the plaintiffs and the members of the class represented by them.

4. A permanent injunction prohibiting defendant, his successors in office, agents and employees from reducing benefits to the plaintiffs and the members of the class represented by them without such a prior hearing.

5. A preliminary injunction prohibiting defendant, his successors in office, agents and employees from reducing benefits to the plaintiffs and the members of the class represented by them without such a prior hearing.

6. A temporary restraining order requiring that pending a hearing as requested herein defendant restore the benefits of the named plaintiffs to the levels to which they would be entitled but for the reduction herein alleged and a temporary restraining order, preliminary injunction and/or permanent injunction requiring that defendant restore to the named plaintiffs all sums by which the benefits of the named plaintiffs have been reduced without a hearing.

7. Determination that this action be maintained as a class action and that the declaratory and injunctive relief ordered apply to all members of the class.

8. Such other and further relief as seem just and proper.

Dated: November 2, 1973.

Susan Savitt
SUSAN SAVITT
NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel: 516-868-8787

Rene H. Reixach
RENE H. REIXACH
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
139 Troup Street
Rochester, New York 14608
Tel: 716-454-6500

Attorneys for Plaintiffs



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Bureau of Retirement and Survivors Insurance

New York, New York

When writing about your claim
Always give Claim No.

065-34-1082

Mrs. Claudia Frost
222 Milburn Avenue
Baldwin, NY 11510

May 2, 1973

Dear Mrs. Frost:

As you requested, your claim has been reconsidered. It has been found that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a member of a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before a hearing examiner of the Bureau of Hearings and Appeals. If you want a hearing you must request it not later than 6 months from the date of this notice. You should make any such request through your social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

Sincerely yours,

Pazuelo D. Caligari

Regional Representative
Retirement and Survivors Insurance

Enclosures:
Form OA-C662
Form RRA-1

FORM SSA-L266 10-68

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

RECONSIDERATION DETERMINATION

PAYMENT CENTER	DISTRICT OFFICE
Office of the Regional Representative (Retirement and Survivors) New York	59 North Main Street Freeport, New York 11520
NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON	SOCIAL SECURITY ACCOUNT NO.
Charles Frost, Jr.	065-34-1082
NAME OF CLAIMANT	TYPE OF CLAIM
Claudia Frost	Mother's Insurance Benefits Children's Insurance Benefits

DETERMINATION:

On August 21, 1968, Charles Frost, Jr. died a fully insured individual. The Social Security Administration determined that the deceased was survived by a widow, Claudia Frost, and four children, James A., Kristin E., Charles E., and Tina L. Frost. The latter two children were born out of wedlock to Mr. Frost and Lola Coolidge. Under the applicable provisions of the Social Security Act in effect at that time, there were no benefits payable to these two children.

The provision of the Social Security Act that prohibited payment to children born out-of-wedlock was declared unconstitutional and the Social Security Administration was instructed by the courts to treat such entitled children the same as all other entitled children. As a result of this decision, social security benefits could not be denied children who were otherwise entitled to benefits.

On February 15, 1973, Notice was sent to Claudia Frost informing her of the court decision and the fact that the benefits to her and her children would be reduced because of the payment of benefits to the two children born to Charles Frost, Jr. and Lola Coolidges. On February 22, 1973, Claudia Frost filed a request for reconsideration protesting the decision to reduce the benefits payable to her and her children.

Section 202(d) of the Social Security Act provides that every child of an individual who died fully insured will be entitled to a child's insurance benefit provided:

1. An application for benefits has been filed,
2. At the time of filing, the child was unmarried, under 18, or a full time student if over 18, or disabled prior to age 18, and
3. Was dependent upon the insured individual at

FORM 0A-C662 (6-63)

60-664-271

Charles Frost, Jr.

065-34-1082

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the time of that individual's death.

Section 216(e) of the Social Security Act provides that the term "child" means:

1. A child or legally adopted child of an individual or
2. A stepchild

Section 216(h)(2)(A) of the Social Security Act provides that when determining the status of an applicant as a child, the Social Security Administration shall apply such laws as would be applied by the courts of the State of domicile of the deceased at the time of his death as would be applied relative to the taking of intestate personal property. Applicants who would have the status relative to the taking of intestate personal property of a child shall be deemed such.

Section 216(h)(2)(B) of the Social Security Act provides that where an applicant does not have status under Section 216(h)(2)(A), he will be deemed a child if the child's father and mother went through a marriage ceremony that would have resulted in a purported marriage between them except for the existence of a legal impediment to their contracting a valid marriage.

Section 216(h)(3) of the Social Security Act provides that when an applicant is not the child under the provisions of Section 216(h)(2), he or she shall nevertheless be deemed the child of the insured if:

1. The individual acknowledged in writing that the applicant is his son or daughter,
2. The applicant was decreed by a court to be the son or daughter of the insured individual,
3. The insured individual was ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter, or
4. The insured individual is shown by evidence satisfactory to the Social Security Administration to be the father of the applicant and was living with or contributing to the support of the applicant at the time of the insured individual's death.

Section 215(a) of the Social Security Act provides that there will be a maximum benefit payable under any one record. This maximum will limit the total benefits payable by the Social

Security Administration to the total provided in this section of the Social Security Act.

Section 205(a) of the Social Security Act provides that the Social Security Administration shall have the power and authority to make rules and regulations and to establish procedures which are necessary and appropriate to carry out the provisions of Title II of the Social Security Act. The Administration shall also provide for the nature and extent of the proofs and evidence necessary in order for an applicant to establish his right to benefits.

The Social Security Administration determined that the children born to Lola Coolidge, Charles E. Frost and Tina L. Frost, were fathered by Charles Frost, Jr. and that they were living with him at the time of his death. Hence, the children were entitled under the provisions of Section 216(h)(3) of the Social Security Act. Although Claudia Frost has disputed the determination that Charles Frost, Jr. did father the two children and that he was living with them at the time of his death, she has submitted absolutely no evidence to support her contention. Consequently, the finding that the two children born to Lola Coolidge are entitled children will remain undisturbed.

The question as to whether these children are eligible to be paid benefits has been settled in the courts. The Social Security Administration has been directed to pay monthly benefits to children who qualify under Section 216(h)(3) of the Social Security Act under the same conditions as it pays benefits to other children who qualify.

Finally, therefore, the only remaining question is the amount of benefits to be paid to the individuals entitled on Mr. Frost's record.

Each of the currently entitled individuals, Claudia Frost, Kristin E. Frost, James A. Frost, Charles E. Frost, and Tina L. Frost are each entitled to receive as their monthly benefit three-fourths of the deceased's primary insurance amount (the amount that would have been paid to him at age 65). The current primary insurance amount is \$229.60 and each of the beneficiaries is entitled to \$172.20 a month. However, Section 215(a) of the Social Security Act limits the total benefit payable on Mr. Frost's record to \$478.50. Since each of the beneficiaries were entitled to the same percentage of the deceased's primary insurance amount, they share equally in the maximum amount of \$478.50 and are, therefore, entitled to receive \$95.70 each.

Charles Frost, Jr.

665-34-1082

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It is, therefore, determined that the initial determination which found the two children, Charles E. Frost and Tina L. Frost, entitled to benefits under Section 216(h)(3) of the Social Security Act was correct in all respects. It is further found that the decision to reduce the monthly benefits payable to Claudia Frost, James A. Frost, and Kristin E. Frost is correct and in accordance with the provisions of Section 215(a) of the Social Security Act.

Bernard Levine

Bernard Levine
Chief, Reconsideration Branch

May 2, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,

Plaintiffs,

Civil Action No.

-against-

CASPAR WELBORG, R., as Secretary
of the United States Department
of Health, Education and Wel-
fare,

Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the verified complaint herein
and the annexed affidavit of the plaintiff, Claudia Frost, and
the annexed affidavit of Rene H. Reixach, Esq., a motion will
be made before the Hon. Anthony J. Travia, at the United States
Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, at
10:00 o'clock in the forenoon on the 26th day of November, 1973,
for a preliminary injunction or in the alternative for a tem-
porary restraining order as prayed for in the complaint, and for
such other and further relief as seems just and proper.

Dated: Freeport, New York
October 19, 1973

Yours, etc.

Rene H. Reixach
SUSAN DAVITT, USA.
MHAUSA LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
516-868-5757

RENE H. REIXACH, PC¹,
GREATER UP-STATE LAW PROJECT
MONROE COUNTY BAR
ATTORNEY-AT-LAW
130 Broad Street
Rochester, New York 14603
716-454-6299
Attorneys for Plaintiffs

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TO: Hon. Caspar Weinberger, Secretary
United States Department of Health,
Education and Welfare
Washington, D.C.

Hon. Elliott Richardson
Attorney General
United States Department of Justice
Washington, D.C.

Robert Morse, Esq.
United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,	:	
Plaintiffs,	:	Civil Action No.
-against-	:	
CASPAR WEINBERGER, as Secretary	:	<u>AFFIDAVIT</u>
of the United States Department of	:	
Health, Education and Welfare,	:	
Defendant.	:	

STATE OF NEW YORK) SS:
COUNTY OF NASSAU)

CLAUDIA FROST, being duly sworn, deposes and says:

1. I am a named plaintiff in this action, which I am bringing on behalf of myself and behalf of two of my minor children as their next friend, as well as on behalf of a class of persons similarly situated. I make this affidavit in support of my motion for a preliminary injunction or alternatively for a temporary restraining order for myself and my two children whose interests I represent.
2. In support of my motion generally I rely on my verified complaint, a copy of which is annexed hereto and which is incorporated herein by reference.
3. Briefly stated, I seek an order requiring the defendant, who is the government official responsible for the administration of the Social Security program, to restore the social security survivors' benefits being paid to me and the two minor plaintiffs to the level at which those benefits were paid before an administrative reduction earlier this year, to reimburse us for the amounts withheld since that reduction, and to continue those benefits at the higher level, without reduction until such time as a

decision has been rendered in a due process fair hearing on the issue of whether those benefits can be reduced.

4. After receiving these benefits for over four years I was notified by the Social Security Administration in February, 1973, that the benefits were going to be reduced because the Social Security Administration had determined that the decedent, my late husband and the father of the two minor plaintiffs, had two illegitimate children now entitled to a share of his survivors' benefits. I requested an opportunity to see the evidence relied on by the Social Security Administration in reaching that determination, and that was denied. In May, 1973, I requested a hearing, and to date no hearing has been scheduled. Also, I have had no opportunity to confront and cross-examine any adverse witnesses, to appear personally before a decisionmaker, to appear by counsel before the decisionmaker or to exercise any of the other rights which I am guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States before I can be deprived of this property by the Social Security Administration.

5. Prior to the social security payment made on or about June 3, 1973, for the month of May, 1973, the two minor plaintiffs and I received survivors' benefits totalling \$477.90 per month. Commencing with the June 3, 1973 payment, our benefits have been reduced to \$287.10 per month, a reduction of \$190.80 per month, or forty per cent (40%). This reduction has now been in effect for five months, depriving us of over \$950.00 in benefits. None of this reduction has been compensated or made up from any other source. While I have a third child who receives public assistance benefits, her assistance has not been increased to offset the reductions affecting the rest of the family.

6. The effects of this forty per cent (40%) reduction, totalling nearly two hundred dollars a month, have been quite serious for me and my children. Until the aforesaid reduction in benefits went into effect I had been able to meet my monthly payments on a Sears-Kroebuck and Company charge account and a Master Charge account at First National City Bank, both of which I had regularly paid since 1968 when the accounts were opened. Since the reduction in benefits I have been unable to meet these payments, and the two accounts, on which a total of approximately \$1600.00 is due, have now been referred to attorneys for collection. I incurred these obligations on the good faith assumption that the survivors' benefits which we had been regularly receiving without question for several years would continue.

Although a new school year has started, I have been unable to afford new clothes for my children since I no longer have sufficient monthly benefits to pay for these items. Likewise our utility payments are falling into arrears and I have not been able to meet both the telephone and electric bills each month. Already one disconnect notice has been received as a result. And my monthly rent of \$130.00, which I could afford at the former level of benefits is now simply too much to carry -- it is approximately forty-five per cent (45%) of our monthly income instead of its former thirty per cent (30%).

7. In sum, after several years of receiving benefits at one level, and having no reason to believe they were to be reduced, our family has been forced into dire straits by a decision made without a hearing, without any revelation of the evidence relied on in making it, without confrontation and cross-examination, without any due process safeguards.

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WHEREFORE, I pray that the defendant be ordered to restore our benefits to their pre-reduction level, to immediately pay us all the amounts which have been withheld since the reduction of our benefits, and to continue benefit payments in the future without any reduction until and unless a decision adverse to our claims is rendered after a full due process fair hearing in the form requested in the complaint.

(Signature)

CLAUDIA TROY

Sworn to before me this

12th day of October, 1973.

Selby J. Feltz

SELBY J. FELTZ
NOTARY PUBLIC STATE OF PENNSYLVANIA
No. 30-023285, Bureau #1
Date Issued: March 20, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,

Plaintiffs,

Civil Action No.

-against-

CASPAR WEINBERGER, as Secretary :
of the United States Department of:
Health, Education and Welfare, :

AFFIDAVIT

Defendant. :

STATE OF NEW YORK) SS:
COUNTY OF MONROE)

RENE H. REIXACH, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and I make this affidavit in support of the plaintiffs' motion for a preliminary injunction or temporary restraining order. I am one of the attorneys for the plaintiffs and I am thoroughly familiar with this action.

2. In addition to the particular hardships being inflicted upon the plaintiffs, as set forth in the accompanying affidavit of the plaintiff Claudia Frost, the statistics compiled by the Social Security Administration itself reveal the serious and irreparable injury being inflicted on the plaintiffs by the reduction in their survivors' benefits without a prior fair hearing.

3. At the pre-reduction level of benefits the plaintiffs received \$5,734.80 in survivors' benefits each year. After the reduction their benefits are only \$3,445.20 a year. This reduction of nearly \$2,300. annually has placed the plaintiffs at or below the "average poverty threshold" defined by the Social Security Administration for nonfarm families. In 1971 that

"poverty threshold" for three persons was an annual income of \$3,220, according to the Annual Statistical Supplement 1971, Social Security Bulletin, Table 7, page 31. Applying the increase in the Consumer Price Index of 11.1 points since 1971, the "poverty threshold" for three persons is now at least \$3,500, more than the benefits being received by the plaintiffs. The increase in the Consumer Price Index is shown through June, 1973, the very month in which the reduction first took effect, in 36 Social Security Bulletin, no. 9, Table H-31, page 60 (September, 1973). And as the Court is aware, inflation has continued since then. Moreover, the cost levels in metropolitan New York City are no doubt higher than the costs nationwide. A recent tabulation of costs of living in this area is now being obtained by my office, and if it is available by the time this motion is heard we will make relevant statistical information available to the Court and opposing counsel.

4. There can be no doubt from these facts that the reduction of these plaintiffs survivors' benefits by nearly \$2300 per year has irreparably injured them. Before the reduction they were able to exist at a level which, while certainly not affluent, was at least minimally comfortable. Now they are, even by official standards, poor. It is just that sort of deprivation which the Due Process Clause prohibits without a prior hearing, on notice of the evidence, and with an opportunity for, among other things, confrontation, cross-examination, and representation by counsel.

WHEREFORE, I pray that the plaintiffs' motion be granted.

Ronald R. Reiter
RONALD R. REITER

Sworn to before me this
10th day of October, 1973.

Wade Eaton

R. WADE EATON
Notary Public in the State of New York
Montgomery County, N.Y.
Commissioned Sept. 1, 1974

JDP:LNB:fg
F. 6732,033

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
CLAUDIA FROST, et. al.,

AFFIDAVIT IN OPPOSITION

Plaintiffs,

73 C 1383

-against-

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

Defendant.

----- X
STATE OF NEW YORK
COUNTY OF NASSAU) SS:

LLOYD H. BAKER, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Eastern District of New York, duly appointed, and am in charge of this case, and familiar therewith. I make this affidavit in opposition to the application for a Temporary Restraining Order and a Preliminary Injunction. I make this affidavit on information and belief, based on information supplied to me over the telephone by the office of the General Counsel of the Social Security Administration.

A summary of the procedures adopted and used for cases of this type has been prepared and is being sent to me by mail from the said General Counsel's office.

Also, a summary of the facts of this case has been prepared and is likewise being sent to me.

In Richardson v. Griffin, 409 U.S. 1069 (and Richardson v. Davis, id.) the Supreme Court held that where benefits were being paid to the legitimate children of a wage earner, and there were illegitimate children, the benefits to the legitimate children had to be reduced, and apportioned among all the children. This is because under 42 U.S.C. §415(a) there is a maximum benefit payable under any one record (account of a wage earner insured under Social Security).

To do this, the Secretary has drawn up procedures to be used.

In this case, contrary to plaintiff's contentions, she has known since at least 1969, that there were illegitimate children involved in this matter.

In 1969 she was informed that the Social Security Administration knew about the illegitimate children.

The procedures for reducing benefits are as follows:

Claimant is sent a notice which tells the claimant of the Supreme Court decision in Richardson v. Griffin, the legal reasons why reduction is necessary, advises her of the evidence on which the claim of the other children is based (in this case specifically advised her of birth certificates listing her husband as father), advises her that she can submit any rebutting or contradictory evidence that she has, and that somebody in the local Social Security office will help her prepare and submit the evidence.

She may see any evidence that the Social Security Administration has, upon her request. She will be given a copy, or may see the original evidence. This is contrary to the plaintiff's assertion that she was not allowed to see the evidence, and raises a sharp question of fact which precludes the granting of a Temporary Restraining Order.

After the above procedures have been completed, the claim is sent to a reviewing office where it is held and no further action is taken for 45 days. She can appear at any time before a final reduction is made and submit any evidence which she may have. If she submits any additional evidence, then the reduction will be delayed until any doubt cast by conflicting evidence is removed.

Once the reduction is completed after the 45 day period, she is sent a second notice advising her that she

can request reconsideration. Once this has been done, she can have reconsideration within six months (which was done here). After the reconsideration, she can then request a hearing.

She requested a hearing in this case, but commenced this action before a hearing could be scheduled. Thus, because of the commencement of this action, the Social Security Administration postponed a hearing pending the determination of this action.

Within 60 days after the hearing, she can request review by the Appeals Council. If that is unfavorable to her, she can commence civil action as provided by 42 U.S.C. §405(g). At this point it should be noted that since plaintiff has not exhausted her administrative remedy by obtaining a hearing, this action is barred by 42 U.S.C. §405(h).

It has been held that the opportunity for hearing provided by subsection (b) of that section fully satisfies due process requirements. *Freeman v. Cohen*, 292 F.Supp. 319. See also *Anderson v. Finch*, 322 F.Supp. 195 (1971) where it was held that the procedures adopted by the Social Security Administration to determine eligibility for survivors' benefits are fair ones, and in view of the provisions for administrative review and for hearings after termination of benefits, the mere absence of an evidentiary hearing prior to termination does not present an unconstitutional denial of due process rights.

Furthermore, this Circuit has held in *Hills v. Richardson*, 464 F.2d 995 (1972) that a predetermination hearing prior to reduction of benefits is not required. (Procedures involving overpayment were the issue in that case).

The plaintiff's allegation that she has not had an opportunity to rebut the fact of the existence of illegitimate

children is simply not true, because she has in fact known of the existence of these children since at least 1969 (or 1968), and was given the opportunity to rebut the evidence under the procedures outlined above which were adopted after the Richardson v. Griffin decision.

In this case, on August 21, 1968, Charles Frost, Jr., her husband, died. Shortly thereafter she filed application for survivor's benefits on behalf of her two children, James and Kristin. She stated in her application for survivor's benefits that she had been separated for 3 years, but that it was her understanding that her husband had "remarried" a woman by the name of Lola Coolidge, and that they had had a child. It was later determined by the Social Security Administration that there were two illegitimate children, Charles E. Frost, 3rd and Tina L. Frost, and this determination was based on the fact that at the time of his death he was living with Lola and the older child, and that Lola was pregnant with another child. It was later determined that Charles Frost was listed as father on the birth certificates of both children of Lola.

On May 15, 1969, plaintiff was informed of all this information. She was also informed that if she was dissatisfied with that determination, she must produce documentary evidence disproving it. She stated at that time that she was unable to rebut that evidence.

After the decision of Richardson v. Griffin, the Social Security Administration started to recompute benefits in all such cases.

On February 15, 1973, notice was sent to plaintiff advising her of the court decision, and of the fact that under that decision, the benefits to her children would have to be reduced; she was again advised of the evidence

and advised that she had 30 days to submit any rebutting evidence, and that the local Social Security office would assist her in preparing and submitting that evidence.

On February 22, 1973, she filed a request for reconsideration without submitting any evidence. There was no reduction until the reconsideration was complete, decision being rendered on May 2, 1973.

Additional statements were taken from her after the request for reconsideration, and she stated that she had no proof that her husband was impotent when Charles 3rd and Tina were born, although she had earlier made that assertion.

Reduction of benefits did not take place until the June, 1973 check.

On May 16, 1973 plaintiff filed a request for a hearing. It would have been given to her and scheduled but she commenced this action in September, 1973.

The delay between May and September was occasioned because the hearing examiner cannot schedule a hearing until he receives the claims folder.

There are thousands of cases such as this, and the initial recomputation of all of them took six months. If it were necessary to hold a prior hearing in all cases, it would take years before it could be effectuated. Thus, the payment of benefits to the illegitimate children would be delayed for all that time, thus frustrating the order of the Supreme Court in *Richardson v. Griffin*.

It is urged that no definitive action should or can be taken in this case at this time because, in addition to the reasons set forth above, the parent or representative of the other interested children, the illegitimate children, Charles E. Frost 3rd and Tina Frost are necessary parties. If the plaintiff here must receive full benefits, then the benefits for those children must be eliminated. This of

course must raise the question of their benefits being cut off without an opportunity to be heard. Certainly that would raise a more serious constitutional question than the one raised by this plaintiff.

Likewise, for the same reason, this action cannot be maintained as a class action. The interests of other members of the class, Charles E. Frost 3rd and Tina Frost, are not the same as the interests of these plaintiffs. In fact, their interests are diametrically opposed to the interest of these plaintiffs.

Before concluding, I wish to point out that certain of the cases cited by plaintiffs are not in fact valid precedent for their position. The order in Elliot v. Richardson, which seems to be the leading case which they cite, was vacated on rehearing. The decision which they cite in Knuckles v. Richardson was dated August 17, 1972. However, the defendant Secretary of HHS ultimately won that case on jurisdictional grounds. In Hopkins v. Richardson, plaintiff cites an order granting a Temporary Restraining Order, but that case was ultimately dismissed.

WHEREFORE, I respectfully request that the motion for a Temporary Restraining Order and Preliminary Injunction be denied.

LLOYD H. BAUER
Assistant U. S. Attorney

Sworn to before me this
1st day of November, 1973

FRANCES A. CRANT
Notary Public, State of New York
Ex. #44-70031
Qualified in Suffolk County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,
Plaintiffs, Civil Action No. 73C1383
-against-
CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,
Defendant.

NOTICE OF CLASS ACTION MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rene H. Reixach, Esq., the Amended Complaint herein and all prior proceedings herein, the plaintiffs will move this Court at 10:00 o'clock in the forenoon on the 30th day of November, 1973, or as soon thereafter as counsel can be heard, before the Hon. Anthony J. Travia, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, for an order determining that this action be maintained as a class action, pursuant to Rule 23(b)(2), and for such other and further relief as seems just and proper.

Dated: November 16, 1973

Yours, etc.

S/
SUSAN SAVITT
NASSAU LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel. 516-868-8787

S/
RENE H. REIXACH,
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
139 Troup Street
Rochester, New York 14608
Tel. 716-454-6500

-2-

TO: Hon. Caspar Weinberger
United States Department
of Health, Education & Welfare
Washington, D.C.

Hon. Robert Bork
Acting Attorney General
United States Department
of Justice
Washington, D.C.

Robert A. Morse, Esq.
United States Attorney
Attn: Lloyd Baker, Esq.
900 Ellison Avenue
Westbury, New York 11590

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,
Plaintiffs,

-vs-

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Wel-
fare,

Defendant.

Civil Action No. 73cl383

AFFIDAVIT IN SUPPORT
OF CLASS ACTION MOTION

STATE OF NEW YORK))
COUNTY OF MONROE) SS:

RENE H. REIXACH, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and I am employed as a staff attorney by the Greater Up-State Law Project of the Monroe County Assistance Corporation. I am one of the attorneys representing the plaintiffs herein and I am thoroughly familiar with all the prior proceedings herein. I make this affidavit in support of the plaintiffs' motion for a determination that this action may be maintained as a class action pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure.

NATURE OF THE CLAIMS

2. The plaintiffs are recipients of survivors' benefits under the Social Security Act, 42 U.S.C. sections 401 et seq. Commencing with the benefits they received in June, 1973, the Social Security Administration, the relevant procedures of which the defendant has supervision over and control of pursuant to 42 U.S.C. sections 405(a) and (b), reduced the plaintiffs' survivors' benefits by over \$190.00 per month, some 40% of their benefits under the Act. The plaintiffs had requested a hearing on the facts allegedly underlying this decision to reduce their

benefits in May, 1973, after having unsuccessfully sought to obtain information from the Social Security Administration as to the evidence on which it had relied in making the reduction. Despite the request for a hearing, no hearing was held prior to the reduction being put into effect, and now, some six months later, no hearing has yet been scheduled. The plaintiffs contend that such a reduction without any opportunity for a prior fair hearing deprives them of property without the due process of law and that the defendant must therefore provide for such hearings under his statutory authority to make rules and regulations and establish procedures for determining rights to benefits under the Social Security Act.

3. The issue here is not the factual dispute over the proper level of benefits for the plaintiffs or for any other persons similarly situated; those are issues which are left for the hearings which the plaintiffs seek. The issue is simply whether or not the defendant is constitutionally obligated to provide for such prior hearings as a matter of due process.

Rule 23(a)

4. There are four prerequisites to the maintenance of any action on behalf of a class under Rule 23(a). The rule provides that an action may be maintained as a class action if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

All of those prerequisites are met in this action.

RULE 23(a)(1)--IMPRATICABILITY OF JOINDER

5. According to the most recent figures available to your deponent from the Social Security Administration, there were in 1971 some 6.7 million persons receiving survivors' benefits under the Social Security Act, and over 14,000 persons had their benefits completely terminated for reasons other than death, change in age or marital status or adoption during 1971. On information and belief the number of reductions was also in the thousands. Now there are over seven million recipients of survivors' benefits. All of these figures come from the Social Security Administration's own publication, the Social Security Bulletin, Table M-3, and the 1971 Annual Statistical Supplement, Table III.

6. On information and belief the number of reductions within the last year is higher than the number for 1971 because of determinations similar to that affecting the plaintiffs here. As the affidavit in opposition to a temporary restraining order and preliminary injunction itself states, the decision affecting the plaintiffs arose because of recent Court decisions under which children born out-of-wedlock, who had previously been barred by statute for collecting survivors' benefits, were now eligible to receive such benefits (pp 1-2). Because there is a maximum level of benefits payable to any insured's beneficiaries, the addition of other persons sharing in the benefits would, in many cases, result in many cases in a reduction in the benefits paid to the former sole beneficiaries, just as was the case here. So in addition to the normal number of reductions there are, on information and belief, an even greater number due to the impact of these Court rulings.

7. Moreover, because of the nature of the relief sought, it will benefit not merely those persons now facing benefit reductions, but all persons who will face such reductions in the future. As the population grows and Social Security coverage expands, it seems quite certain that the number of persons facing reductions will also grow, and that tens of thousands of Social Security beneficiaries will be so situated in the future.

RULE 23(a)(2)--COMMON ISSUES

8. The common issue applicable to all the members of the class is whether they have a constitutional right under the due process clause to a prior hearing before any reduction in their survivors' benefits under the Social Security Act. The facts of each individual recipient's situation are not at issue here, and would be left to the hearings which the plaintiffs seek.

RULE 23(a)(3)--TYPICALITY

9. Just as there is but one issue here, so is that issue inherently typical of the claims of all of the class. While the facts on the merits of any particular reduction are unique, these are not relevant here. What is relevant is the common claim that due process requires a prior hearing.

10. Likewise there is no conflict between the relief sought by the plaintiffs and the interests of the rest of the class. The plaintiffs seek an opportunity for a prior hearing before any recipient's benefits could be reduced, including the claimants who are now receiving benefits from the Social Security estate of the decedent. They cannot be hurt by having that right established, for before their benefits could be reduced, as the Social Security Administration has threatened to do if the plaintiffs' benefits were restored by court order pending a hearing, they too would have the opportunity for a hearing, and any order herein against the defendant could so provide.

RULE 23(a)(4)--ADEQUACY OF REPRESENTATION

11. The plaintiffs here clearly have a stake in this proceeding which makes their representation adequate. They have already suffered a deprivation of over \$1100.00 in survivors' benefits without a hearing, and they will be receiving survivors' benefits for years to come (the minor plaintiffs are under ten years of age), during which time they might be subject to further reductions for some reason or another and in which proceeding they would benefit by having the right to a prior hearing with benefits continuing pending the decision, and with the full panoply of due process rights in such a proceeding.

12. The plaintiffs are represented by attorneys employed by Legal Services programs funded by the Office of Economic Opportunity. Your deponent is a member of the Bar of this Court, as well as the Southern and Western Districts of New York, the United States Court of Appeals for the Second Circuit and the State of New York. He has had extensive experience in class action litigation, having been one of the attorneys actively involved in the successful opposition to a class action in Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972). He has also been an attorney actively involved in opposing class action motions in Blackoff v. Universal Guardian Corp., 72 Civ. 2288 (SJR), pending before Judge Ryan in the Southern District of New York, and Steinbart v. The Equitable Life Assurance Society of the United States, et. al., 72 Civ. 4271 CMM pending before Judge Metzner in the Southern District of New York.

RULE 23(b)(2)

13. If an action meets the prerequisites of Rule 23(a), it may be maintained as a class action if it further meets the

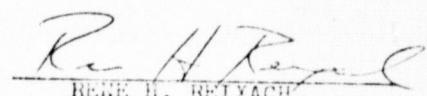
requirements of one or more of the provisions of Rule 23(b). This action meets the requirements of 23(b)(2), which provides for maintenance of a class action where

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

14. The party opposing the class, the Secretary of the United States Department of Health, Education and Welfare, is responsible for making rules and regulations and establishing procedures for establishing the right to Social Security benefits and to conduct hearings necessary for the administration of the Social Security program. 42 U.S.C. sections 405(a) and (b).

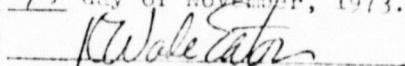
15. By failing to promulgate regulations providing for an opportunity to have a fair hearing prior to a reduction in survivor's benefits, and by reducing such benefits without providing for a prior hearing the defendant has acted and is acting in the same way as to all recipients of survivors' benefits who are faced with a reduction of those benefits. And that stance also constitutes a refusal to act on grounds equally applicable to the class as a whole in that the defendant refuses to provide for such hearings. Accordingly either or both declaratory and injunctive relief, as requested by the plaintiffs, is appropriate.

WHEREFORE, your deponent prays that this Court enter an order determining that this action be maintained as a class action under Rule 23(b)(2) as requested in the amended complaint herein.


RENE H. REITACH

Sworn to before me this

15 day of November, 1973.



K. WADE EATON
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1974

39

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

CLAUDIA FROST, et. al.,

Plaintiffs,

AFFIDAVIT

-against-

73 C 1383

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

Defendant.

----- X

STATE OF NEW YORK)
COUNTY OF LONG ISLAND) ES:

LLOYD H. BAKER, being duly sworn, deposes and
says:

I am an Assistant U. S. Attorney for the Eastern
District of New York, and am assigned to this case and
familiar therewith. I make this affidavit in opposition
to the motion under Rule 23(b) to maintain this case as
a class action.

(a) Nootness

When this Court denied plaintiff's motion for a
preliminary injunction, it directed the defendant to give
plaintiff a hearing within 30 days.

This was done, and a hearing was held on November
27th.

Thus the matter is moot as to this plaintiff, and
she cannot maintain the action as a representative of the
class which she purports to represent. Such is the holding
of cases cited in our memorandum of law.

(b) Antagonism of Interest of This
Plaintiff To Other Members of The Class

It is apparent by the very nature of the claim of this plaintiff that her interest, and the interests of ^{charles} her/whom she represents herein are diametrically opposed to the interests of Earl Coolidge (Frost) and the children of Lola, Charles E. Frost and Tina L. Frost.

Plaintiff is the widow and the mother of the legitimate children of Charles Frost, Jr., who died in 1963, an insured person under the Social Security Act. They commenced to collect survivors benefits. In Richardson v. Griffin, 409 U.S. 1069 and Richardson v. Davis, id., it was held that illegitimate children had to share Social Security benefits equally with legitimate children. Under 42 U.S.C. Section 415(a) there is a maximum benefit, payable under any one record (account of a wage earner insured under Social Security), so this necessarily means that the benefits to the legitimate children have to be reduced in order to be shared with the illegitimate children. Under the procedures set up by the Social Security Administration to accomplish this, the parent of the legitimate children is given an opportunity to see the evidence upon which the finding of illegitimate children is made, to submit rebutting evidence, and have the entire matter reviewed before a reduction is made. If any substantial contradictory evidence is submitted, reduction is further delayed until doubt cast by conflicting evidence is removed.

If a hearing must be held before a reduction is made, as plaintiff contends, it is obvious that it would further delay the payment of benefits to the illegitimate children, and thus their interests are exactly opposed to the interest of this plaintiff. Since this situation, by

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its very nature, divides the class into two virtually equal opposing groups, this plaintiff cannot maintain this as a class action. This is highlighted by the fact that, as I have been advised by the office of the General Counsel, HEW, that there are thousands of such cases, and that if a hearing had to be held before reduction of benefits, the delay would be very extensive, thus effectually frustrating the order of the Supreme Court in Richardson v. Griffin. Clearly this would work to the detriment of approximately half the class whom plaintiff purports to represent.

(c) Improper Venue Because Of The Location Of The Other Necessary Parties

I am informed by the office of the General Counsel that Lola Coolidge (Frost) and her children reside near Plattsburgh, which is in the Northern District of New York. I am sure the Court will take judicial notice of the fact that Plattsburgh is in the far northern reaches of the State, approximately 250 miles, perhaps 300 miles from Brooklyn. This creates a problem as to the joinder as parties defendant of those necessary parties. In any action which might affect their benefits, they should be given the opportunity to be represented. This problem is best left to the agency. The entire matter is subject to judicial review under 42 U.S.C. Section 405(g), using the substantial evidence rule.

WHEREFORE, I respectfully request that the motion
for a class action be denied.

LLOYD H. LIEBER
Assistant U. S. Attorney

Dworn to before me
this 11th day of December, 1973

FRANCIS A. GRANT
Notary Public, State of New York
No. 41-14-1721
Qualified in Bronx County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,	:	
Plaintiffs,	:	Civil Action No.
-against-	:	73C 1343
CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,	:	REPLY AFFIDAVIT IN SUPPORT OF CLASS ACTION MOTION AND RENEWAL OF REQUEST FOR TEMPORARY RELIEF
Defendant.	:	

STATE OF NEW YORK) SS:
COUNTY OF MONROE)

RENE H. REIXACH, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am one of the attorneys for the plaintiffs herein.

2. While a hearing was held before the Social Security Administration on this matter on November 27, 1973, I am informed by Susan Savitt, Esq., the other attorney for the plaintiffs, that no decision has yet been rendered in that hearing, and that recently new evidence has been attempted to be introduced subsequent to the hearing by the new claimants which will require further proceedings. I am further informed that the plaintiff Claudia Frost is now being sued because of her inability to meet the debts she incurred prior to the reduction of survivors benefit, and which she had relied on to meet those obligations.

3. And for conclusion in the affidavit of Lloyd Baker, Esq., dated December 11, 1973 (the "Baker affidavit") that benefits to legitimate children "necessarily . . . have to be reduced in order to be shared with the illegitimate children." (p.2), that is only the case where the maximum benefit level under 42 U.S.C. section 415(a) is being paid, which is not the case if there are a

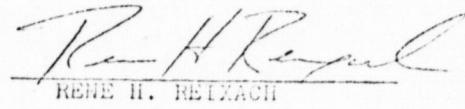
very few beneficiaries under the decedent's Social Security estate. The Baker affidavit refers to "thousands" of pending cases (p.3), but nowhere states how many of those cases would even ultimately result in benefit reductions. Nor does it indicate how many persons might even request such a hearing - it does not even offer any suggestions based on the numbers now requesting subsequent hearings. So too, persons not receiving benefits yet would not be in a class entitled to a hearing before benefits could be reduced. In short, those allegations of an alleged conflict between the plaintiffs and the class are totally insufficient.

4. Contrary to the contention in the Baker affidavit I am further advised that the Social Security Administration now reports that Ms. Lola Coolidge resides in Connecticut. And as for the alleged problem of joinder of her should she ever prove to be a necessary party, a contention which has never been explained by the defendant and which plaintiffs deny, her rights have been fully protected by the fact that she was brought by the Social Security Administration to the hearing on November 27th from wherever she then resided and has subsequently submitted further documents in support of her claim.

5. As for the contention that "the entire matter is subject to judicial review under 42 U.S.C. Section 405(a), using the substantial evidence rule" (Baker affidavit, ¶c), that simply misstates the nature of this action. This action is not a dispute between the plaintiffs and Ms. Coolidge, but an attempt to require the defendant government official to change the timing of the hearing afforded to resolve such disputes. This constitutional issue is plainly not one for the agency to decide.

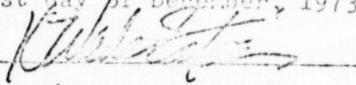
-3-

WHEREFORE, deponent prays that the plaintiffs' class action motion be granted and that their survivors' benefits be restored to their former status pending determination of the hearing held last month.


RENE H. RETZACH

Sworn to before me this

21st day of December, 1973



K. WADE EATON
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1978

U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

CLAUDIA FROST, et. al.,

Plaintiffs,

ORDER

73 C 1233

-against-

CASPAR WIEHNER, as Secretary
of the United States Department
of Health, Education and Welfare,

Defendant.

Plaintiffs having moved this Court for a Temporary
Restraining Order and Preliminary Injunction and said motion
having come on before this Court on November 2, 1973, the
plaintiffs having appeared by Susan Savitt, Esq., of Human
Law Services Committee, Inc. and Rene H. Reimach, Esq., and
defendant having appeared by ROBERT A. HORSE, United States
Attorney, Lloyd M. Baker, Assistant U. S. Attorney of
counsel, and the Court having heard Rene H. Reimach, Esq.,
in support of the motion, and Lloyd M. Baker, Esq., in
opposition to the motion, and the Court having read the
affidavit of Claudia Frost, sworn to October 12, 1973, and
of Rene H. Reimach, sworn to October 10, 1973 in support
of the motion, and the affidavit of Lloyd M. Baker, sworn
to November 1, 1973 in opposition to the motion, now on
motion of ROBERT A. HORSE, United States Attorney, it is

ORDERED that the motion for a Temporary Restraining
Order and Preliminary Injunction be and the same hereby
is denied without prejudice to renewal and being restored to
the motion calendar upon the condition set forth below,
and it is further

ORDERED that the defendant shall hold an ad-
ministrative hearing in this matter within one month from the
date hereof, and it is further

certified that the time of the defendant to serve or move with respect to the complaint is extended through and including December 21, 1973.

Dated: Brooklyn, New York
November 1, 1973

John J. Doherty
U.S. DISTRICT ATTORNEY'S OFFICE

CLAUDE FROST, et. al.,

Plaintiffs,

ANSWER

Opposite

73 C 1003

CHARLES WINGARD, as Secretary of
the Department of Health, Education and Welfare,

Defendant.

Defendant answering the amended complaint by
EDWARD JOHN HOOD V, United States Attorney for the Eastern
District of New York, respectfully shows to the Court and
alleges:

1. The allegations of paragraph 1 present a question of law which is respectfully referred to the Court.
2. Denies knowledge or information sufficient to form a belief as to each and every allegation of paragraphs 2, 10, 12 and 17.
3. Denies each and every allegation of paragraphs 4, 5, 10, 12, 15, 20 and 20.
4. Denies each and every allegation of paragraph 13, except admits that the children entitled to share the benefits of the deceased wage earner's Social Security account are Charles N. Frost and Tina L. Frost.
5. Answering paragraph 11 defendant alleges that the claim that Charles N. Frost and Tina L. Frost were born out of wedlock to Charles Frost, Jr. and Iola Coolidge was presented by the said Iola Coolidge.

6. Admits each and every allegation of paragraph 18, except admits that at no time in the administrative proceedings, plaintiff CLAUDIA FROST was advised that she had a right to request reconsideration of the decision which is the subject of this action.

7. Denies knowledge or information sufficient to form a belief as to each and every allegation of paragraph 20, except admits that at no time in the administrative process the plaintiff CLAUDIA FROST stated that she could offer no proof that her late husband had not fathered Charles S. Frost and Tina L. Frost.

8. Admits the allegation of paragraph 21 that plaintiffs were never advised of a right to a pre-reduction hearing, as plaintiffs do not have any such right, and denies that plaintiff has not had an opportunity to examine the documents and records on which the reduction in benefits is based prior to the reduction being put into effect.

9. Denies each and every allegation of paragraph 23, except admits that on or about May 16, 1973 plaintiff CLAUDIA FROST requested a hearing.

AS AND FOR A FIRST COMPLAINT, SEPARATE
AND APPROPRIATE DIVISION

10. The only jurisdiction of the Court in this cause is that provided by 42 U.S.C. Sect. 405(g), namely to review the "final decision of the Secretary," and "to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

11. Plaintiff has been given a hearing, and the matter is therefore ripe.

AS AND FOR A THIRD GROUNDS, SEPARATE
AND INDEPENDENTLY STATED

12. Plaintiffs have not exhausted their administrative remedies.

AS AND FOR A FOURTH GROUNDS, SEPARATE
AND INDEPENDENTLY STATED

13. The plaintiffs have failed to join necessary parties, to wit Lola Coolidge (Front), Charles E. Front and Tina L. Front, as provided by Rule 19 of the Federal Rules of Civil Procedure.

AS AND FOR A FIFTH GROUNDS, SEPARATE
AND INDEPENDENTLY STATED

14. The interest of the plaintiffs herein is adverse to the interest of other members of the proposed class, and therefore this action cannot be maintained as a class action.

WHEREUPON, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

BENEDICT, SAWYER & VOGEL
Acting United States Attorney
Attorney for Defendant

By: _____
Lloyd H. Sawyer
Assistant U. S. Attorney

TO: Susan Savitt, Esq.
Kosciusko County Law Services Committee, Inc.

Morgan County Legal Assistance Corp.
Center United Law Project

CLINTON COUNTY DISTRICT COURT
CLINTON COUNTY, NEW YORK
CLAUDIA FROST, ET AL.,

Plaintiffs,

MOTION FOR JUDGMENT

-against-

73 C 1343

CARLTON WILHELMSEN, as Secretary of
the United States Department of
Health, Education and Welfare,

Defendant.

S I G N S : X

PLEASE TAKE NOTICE, that upon the annexed affidavit of
LOYD H. BAKER, sworn to February 1, 1974, and the exhibits
annexed thereto, and all the pleadings and proceedings heretofore
had herein, the undersigned will move this Court at a term for
the hearing of motions to be held at the United States Courthouse,
225 Cadman Plaza East, Brooklyn, N.Y., on March 3, 1974 at 10:00
o'clock in the forenoon of that day or as soon thereafter as
counsel may be heard, for an order granting summary judgment
to the defendant, and for such other and further relief as to the
Court may seem just and proper in the premises.

Dated: Brooklyn, New York
February 1, 1974

Yours, etc.

EDWARD JOHN BOYD, V.
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

By:

TO:
Susan Savitt, Esq.
Nassau Law Services Committee, Inc.
115 No. Main Street
Freeport, L.I. 11520

LOYD H. BAKER
Assistant U.S. Attorney

Rene H. Reimach, Esq.
Greater Up-State Law Project
Monroe County Legal Assistance Corp.
112 Troop Street
Rochester, N.Y. 14607

CLAUDIO FROST, et al.,
LAST KNOWN ADDRESS OF CHARLES FROST,
CLAUDIA FROST, ET AL.,

Plaintiffs.

ATTORNEY
73 C 1323

-against-

CHARLES WILHELMUS, as Secretary of
the United States Department of
Health, Education and Welfare,

Defendant.

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

LLOYD H. LAMER, being duly sworn, deposes and says:

I am an Assistant United States Attorney, am in charge
of this case, and familiar therewith, and I make this affidavit in
support of this motion for summary judgment.

The plaintiff, Claudia Frost is the widow of Charles
Frost, Jr., who died on August 21, 1968, a fully insured individual
under the Social Security Act. The action is also brought on
behalf of two minor children who are the children of the deceased
and the plaintiff, Claudia Frost.

These plaintiffs complain of a finding by the Social
Security Administration that there are two illegitimate children
of the deceased, who must share in the Social Security benefits,
pursuant to decisions of the Supreme Court in Richardson v. Griffin,
409 U.S. 1069 (1972) and Richardson v. Davis, *id.*

Plaintiff also alleges that she has a constitutional right
to a hearing before the reduction in benefits as a result of
sharing the fund with the illegitimate children is put into effect.

As is more fully set forth in the Statement Pursuant to
Local Rule 9(g) filed herewith, the plaintiff was informed of the
existence of the illegitimate children and given an opportunity to
submit any rebutting evidence she might have well in advance of the
reduction being put into effect. She was also given the right to
have the determination reconsidered prior to the reduction being
put into effect. A copy of the claims manual of the Social
Security Administration setting forth the procedures used in cases
of this nature is annexed hereto.

Plaintiff made an application for a preliminary injunction and the application was denied on November 2, 1973. Pursuant to the court's order denying the preliminary injunction, a hearing was held on November 27, 1973. At the hearing, plaintiff's attorney asked for and received additional time to submit additional evidence and/or legal argument. Therefore, upon information and belief, no decision has yet been rendered by the hearing officer.

Thus, by reason of the hearing, plaintiff's request for a hearing has become moot, and the complaint should be dismissed for that reason.

Reference is made to my affidavit of December 11, 1973 in opposition to the motion for a class action, on that question. That motion is presently pending, and the court has indicated that it will be considered along with the present motion.

The plaintiff has a right to judicial review of the agency's decision under 42 U.S.C. §405(g), after completing all steps in the administrative process before the agency, which she has not done. Thus, the complaint should be dismissed for the additional reason of plaintiff's failure to exhaust her administrative remedies.

WHEREFORE, I respectfully request that this motion be granted, and that summary judgment be given to the defendant.

LLOYD H. BAKER
Assistant U.S. Attorney

Sworn to before me this
13rd day of February 1974

CONSTITUTIONALITY OF INDIVIDUAL BENEFIT PROVISION FOR CHILDREN ENTITLED
UNDER SECTION 216(h)(3)

T305. BACKGROUND

The 1965 Amendments to the SS Act added section 216(h)(3) which permits a child to qualify without regard to whether he has the status of a child under State inheritance laws or was the child of a valid ceremonial marriage. Certain illegitimate children were the primary beneficiaries of this change. As a result, when these illegitimate children were added to an entitled family unit, other beneficiaries on the rolls prior to the amendment had their benefits reduced. Public reaction to this reduction in benefits led, in 1968, to an amendment to section 203(a)(3). This amendment (known as the residual benefit provision) provided that children entitled under section 216(h)(3) would receive benefits only to the extent that the family maximum benefit was not being paid.

The residual benefit provision has now been declared unconstitutional in a judicial class action on the grounds that the provision arbitrarily discriminates against these illegitimate children. As a result all claims involving a reduction under this residual provision must be reworked as though the provision had never been enacted. Accordingly, it will be necessary to identify and examine each claim where one or more children qualified under section 216(h)(3), and the family maximum is (or was) involved.

T306. GENERAL

The general effect of the court's decision is to require that every child entitled under Section 216(h)(3) of the SS Act be treated in the same manner as any other child qualifying on the same E/R and that any action taken in the past to the contrary should be corrected subject to the rules of administrative finality. As a result it will be necessary to identify cases involving every 216(h)(3) child where the family maximum was involved and to correct the amount of his benefits from the beginning.

T307. IDENTIFICATION

Any claim involving a 216(h)(3) child which comes to the attention of the reviewing office during routine mailing should be reworked immediately in accordance with the instructions in §§ T309-T316. Listings of 216(h)(3) children identified from the EBA have been sent to the reviewing offices. Each reviewing office will locate the cases and process them in accordance with these instructions. If a folder is presently in BSA and the residual benefit provision is an issue, the Reconsideration branch should recall the folder. If as a result of these procedures the reviewing office cannot take fully favorable action on an appeals case, take whatever action is possible under these procedures and return the case to BSA. If the reviewing office can take a fully favorable action, notify the parties of this fact and send a copy of the notice to BSA.

The DO should process any current claim in which there has never been a prior award to an auxiliary or survivor in the same manner as a claim for any other child-claimant with respect to the benefit amount (see § T309 ff.). All other claims involving a 216(h)(3) child, whether already entitled or currently filing, which involve the family maximum now or in the retroactive period, should be conditionally adjudicated per § 4511. Enter "216(h)(3) child involved" as the reason for conditional adjudication.

T308. DISTRICT OFFICE INVOLVEMENT

(a) Handling Inquiries

Any individual inquiring on behalf of a beneficiary whose benefits may be increased as a result of the court's decision should be informed that adjustments in benefits and back payments will be handled automatically by the reviewing office. However, because of the volume of cases affected, there may be some delay before all adjustments can be made. Inquiries on behalf of a beneficiary whose benefits may be decreased as a result of the court's decision should be handled in accordance with (b) below.

(b) Providing Complete Explanations

We expect that each beneficiary whose benefit amount is being reduced will want a detailed explanation of the reason for the reduction. The DO should be familiar with the background and procedures covered here. Accurate, complete explanations at the DO level could greatly decrease the number of requests for reconsideration.

When a beneficiary visits the office with a notice similar to the one shown in § T315, the DO should give the beneficiary a complete explanation of the background as explained in § T305. The notice should contain the specific basis for establishing the entitlement of the 216(h)(3) child. If the notice does not contain this information and the beneficiary wants to know the specific basis, the DO will contact the appropriate reviewing office by the most expeditious means for this information.

The beneficiary has the right to see the original evidence which was used as a basis for entitling the 216(h)(3) child. If a copy of the evidence will satisfy the beneficiary, the DO will request it from the reviewing office. If the beneficiary insists on seeing the original evidence in the custody of SCA, the DO will request it. However, if the evidence is a matter of public record, the DO should advise the individual where the record is located and furnish a copy of the file copy or certification. Under no circumstance should custody of an original document be transferred to the beneficiary. When the evidence or a copy is shown to the beneficiary, care must be exercised to insure that only information pertinent to the issue is disclosed (see § 7505(e)).

Information as to the current whereabouts of the child(ren) and/or his representative payee is not generally pertinent to the claim and should not be disclosed. If the beneficiary disagrees and so authorizes, to protect the decision and that he will submit evidence to validate the 216(h)(3) child's claim, complete a Report of Contact to this effect and ask the beneficiary to submit the evidence. This Report of Contact should be forwarded to the reviewing office, where it will be determined whether evidence casts doubt on the original determination. Regardless of whether a protest is filed, the DO must thoroughly document, on a Report of Contact, any discussion with the beneficiary.

(c) Requests for Assistance from Reviewing Office

The DO will also be required to develop termination, suspension, deduction and representative payee continuation for the retroactive period as described in § 4312. In addition, if the 216(h)(3) child was terminated at age 18 consider the possibility of student benefits (see § 331) and disabled child benefits (see §§ 335 ff.).

REVIEWING OFFICE PROCESSING

T309. GENERAL

In the reviewing office, adjudication of cases involving a 216(h)(3) claimant or beneficiary should be made by the Claims Authorization Branch (CAB). Unless otherwise indicated, CMS will prepare an amended award. The relationship entry now required in Item 6 of Form OA-CIOA for a 216(h)(3) child (see § 4706.5) should be continued. In addition, all amended awards prepared as a result of these procedures should include in Item 11 the remark "Amended Award--Residual Benefit Provision Involved." All other remarks in §§ 4711 ff. should be shown where they apply.

T310. NEW CLAIM--NO 216(h)(3) CHILD ON ROLMS

(a) No Other Current Beneficiary (Other Than WF)

If a 216(h)(3) child claim is currently being processed and there are no other beneficiaries (other than the WE) presently entitled (or entitled within the retroactive life of the new claim), all other children should be treated the same as any other child's claim. That is, the 216(h)(3) child should be treated the same, for benefit amount purposes, as any other child under present procedures and an initial award prepared by the DO.

(b) Current Beneficiaries Residing in Same Household With 216(h)(3) claimant or have the same representative payee

If a claim for a 216(h)(3) child is currently being processed and there are other beneficiaries currently entitled (or entitled within the retroactive life of the new claim), all of whom reside in the same household with the 216(h)(3) child or have the same representative payee, prepare an amended award entitling the 216(h)(3) child and reducing the benefits due the other beneficiaries just as is currently done when any other child becomes entitled as a late filer. All adjustments can be made at this time. A student of the same family, who resides elsewhere, will be considered to reside in the same household for purposes of this instruction. Section 202(j)(1) should be applied where appropriate.

(c) Current Beneficiary Residing in a Different Household

If any of the other beneficiaries (other than the WE) reside in a different household and have a separate representative payee, an award should be prepared to entitle the 216(h)(3) child with the benefit rate determined the same as for any other child. The award should show all affected beneficiaries and their adjusted rates; however, the reduction in rates for the other beneficiaries for benefit check purposes should not be effectuated until proper notice has been sent. The following three actions should be taken immediately by CAP:

(1) Send a notice to the beneficiaries whose benefits will be reduced advising them of the reason for the reduction and their right to submit evidence and argument, if any, opposing the reduction (see § T315).

(2) Diary the case for 45 days.

(3) Process the award per § T300 for the 216(h)(3) child (and any other claimant currently being entitled); however, the benefit adjustment shown on the award form for the already entitled beneficiaries should not be processed at this time. This adjustment will be based on the rates shown on the amended award at whichever of the following is later:

(A) effective with the current operating month after the diary matures (the beneficiary does not protest prior to the time the actual adjustment is made), or

(B) effective with the current operating month after complete development establishes that the reduction is proper (the beneficiary protests

prior to the time the actual adjustment is made).

If a protest is received prior to the time the actual adjustment is made, OAS will review the protest. If additional details are needed it should be requested. If the evidence or argument submitted does not cast doubt on the original determination that one child is entitled under section 216(h)(3), a protest which fails to raise doubt over any doubt on the original determination, OAS will issue a Notice of Adjustment to process the adjustment of rates and to advise the entitled beneficiary of the basis for the reduction and the effective date. The notice will also contain the right to reconsideration of the reduction determination (including a copy of the booklet "Your Right to Challenge the Reduction Made In Your Claim"). A protest received after the adjustment has been made will be treated as a request for reconsideration. Any overpayments resulting from this procedure should be handled in accordance with § T316.

T311. NEW CLAIM-216(h)(3) CHILD ON RESUME

(a) 216(h)(3) Child Not Receiving A Residual Benefit

If a claim is currently being processed (whether for a 216(h)(3) child or any other claimant) and there is a 216(h)(3) child already entitled, who is not receiving a residual payment (except if the 1967 Special Savings Clause applies, see § T312), the claim should be processed for benefit purposes in the same manner as any other child claim. That is, the 216(h)(3) child's benefit amount should not be reduced to a residual one because of the current claim. If the current claimant's entitlement would adversely affect the already entitled beneficiary's benefit amount, and the claimant and beneficiary reside in different households, see § T312(b).

(b) 216(h)(3) Child Is Receiving A Residual Payment

If a claim is currently being processed and there is a 216(h)(3) child already entitled but receiving a residual benefit amount, follow the procedures in § T312(a) below for determining the correct action on the 216(h)(3) child and § T312(b) below for determining the correct action on the other entitled beneficiaries whose benefits will be reduced. An award should not be processed at this time to entitle the current claimant. The award will be processed at the time indicated in § T312(a) and (b) below.

Any overpayments resulting from this procedure should be handled in accordance with § T316 below.

T312. NO CURRENT CLAIM-216(h)(3) CHILD CURRENTLY OR FORMERLY ENTITLED

(a) Benefit Rate For 216(h)(3) Child

(1) General

Cases which are identified through normal operations or through the MBR

Identified procedure (see § 312) and if the child(ren) to whom benefits are due if a reduction due to the residual benefit provision is occurring at any time in the place. If not, no action is necessary and the claim can be returned to file unless the specific benefit claim is involved, in which case see § 3123 below.

(c) Residual Benefit Currently Available - Same Household

If the residual provision is currently applicable and all beneficiaries reside in the same household or have the same representative payee as the child of adjustment, and administrative finality does not apply to the other beneficiaries (see § 314), prepare an amended award adjusting the rates of all children from the month of initial entitlement so that they are equal and have FEB advise the payee of adjustment. The notice should include a reconsideration paragraph. For purposes of this instruction, a student of the same family, who resides elsewhere, will be considered to be residing in the same household.

In these cases the benefits due the 216(h)(3) child(ren) will be balanced against the overpayment created by the reduction in benefits to the other beneficiaries. If the net result is an underpayment, this amount should be paid. If the result is an overpayment, handle in accordance with § 312 below.

If the benefits due the other beneficiaries cannot be reduced because of administrative finality the case should be processed the same as if different households were involved (see below).

(3) Residual Benefit Currently Available - Different Households Involved

In cases where the residual benefit provision has been applied, and a 216(h)(3) child has been receiving some payment (no matter how small), prepare an amended award to adjust the rates to the amounts which would have been payable if the residual benefit provision had never been enacted and release the benefits due the 216(h)(3) child(ren) subject to the limitations in §§ 3130 ff. Recompute the rates for all beneficiaries at this time. However, the effective date that the entitled beneficiaries start receiving a reduced benefit check will be determined in accordance with § 312(c).

Where the file does not contain current termination, suspension, deduction, and representative payee information (as is likely in cases where a \$0.00 payment is being made), develop for current information through the DD Diary and case for 45 days. When the needed information is received, prepare an amended award to make the necessary adjustments in benefit rates and release the benefits due the 216(h)(3) child(ren) (see §§ 3130 ff.) unless there are some beneficiaries whose benefits will be reduced (see (b) below) and the 45-day diary has now lapsed. In this case hold the case until the protest is received or the diary matures (whichever is earlier) and then process the award. If the information is not received

in the case of a child born, prepare to make a reduction in the benefit amount to the amount necessary to correct the error. If no reduction will be made to the amount received, or if the amount received is less than the amount due, the correct amount of benefits required will be determined by E&B and reduced.

As a result of these procedures the benefit rate of all currently entitled SSI(h)(3) children must be adjusted to reflect the reduction. Under no circumstances should a currently entitled SSI(h)(3) child remain on the rolls with a residual benefit amount.

(4) Residual Benefit Adjustment

When the residual provision applies to a child's benefit rate for the prior period only (whether or not the child by continuing residence makes the following actions. If the child remains (or resides at the time of termination) in the same household as the child mentioned above, or had) the same representative payee, eligible benefits as in C 1812(e)(4) above. However, where separate households and different payees are involved, develop for termination, suspension, deduction, and representative payee information for the prior period as in (3) above, unless a lump payment was made for all months, in which case only a current census is needed. When the information is received, prepare an amended award and release payment. However, if the information is not received, no adjustment is needed since current benefits are not affected.

(5) Benefit Rate For Other Beneficiaries

The increase in benefit amount to the SSI(h)(3) child(ren) may require a corresponding decrease in the benefit amount of one or more beneficiaries in order to keep total payments within the family maximum (see C 1814 for the effect of administrative transfers on these cases). However, under the adverse claimant procedure the claimant whose benefit is being reduced must be given notice of the reduction before benefits are reduced. See C 1815 for a copy of the notice to be sent in these cases. If a diary has not been prepared in accordance with (e)(5) above, diary the case for 45 days. If a protest has not been received by the time the diary matures, prepare an amended award to adjust benefits in accordance with (e)(4) below. If the termination, suspension, deduction, or representative payee information is not in file at the time this award is prepared, withhold benefits due the SSI(h)(3) child(ren) until this information is received.

If all beneficiaries reside in the same household (including a standee who resides elsewhere) or have the same representative payee, adjust the overpayment against the underpayment as described in (1)(a) above.

(c) Effective Date of Adjustment

For award purposes benefit rates will be adjusted effective with the first month necessary to correct the error. However, the actual effective date of the adjustment to reduce benefits will be effective with whichever of the following is later:

(1) the current procedure is followed so that a family (the beneficiary does not protest) prior to the date the benefit adjustment is made;

(2) the current procedure which starts after the beneficiary has established that the reduction in payment and benefits of guaranteed period to the date the actual adjustment is made.

When the reduction in benefits is finalized, preceded a second notice will advise the beneficiary of the date for the finalized reduced benefits and payable to certain persons, on what date(s), and effective date. Notice of the right to reconsideration of the reduction adjustment will be sent to the beneficiary on the date (including a copy of the booklet "Your Right To Question The Reduction Made In Your Check"). A protest received after the adjustment has been made will be treated as a request for reconsideration. Any overpayments resulting from this procedure should be handled in accordance with § 435.6 below.

2013. CLAIMS INVOLVING THE 1967 SPECIAL SAVING CLAUSE

Under the 1967 Special Saving Clause (see § 4352.3), the 2/35 benefit rate for an entitled 216(h)(3) child was lower than the rates for other children if the family maximum applied. As a result of the court's decision, this discriminatory treatment is unconstitutional. In order to remove this discrimination, it will be necessary to raise the rates of the 216(h)(3) children to a rate equal to that of the other beneficiaries. This adjustment will take place retroactive to 2/68 when this Saving Clause took effect. A 216(h)(3) child who became entitled based on a claim filed in or before 1/68 (the month the Saving Clause took effect) who would have been advantaged by the Saving Clause were he not a 216(h)(3) beneficiary will be treated as if he were a natural legitimate child. That is, the basic benefit amounts of the 216(h)(3) beneficiaries affected by this Saving Clause will be increased so that they would have been had they been "saved" children. This should result in an additional increase in the total of such benefit amounts over the family maximum.

The benefits payable to all beneficiaries affected by the 1967 Special Saving Clause (on the rolls in 1/68), including 216(h)(3) children whose benefits will now be increased to the rates payable to the other child beneficiaries, are considered correct payments and not subject to reopening under the rules of administrative finality based on an error on the face of the evidence. However, administrative finality may still apply in these cases to children not protected by the 1967 Special Saving Clause (see § 4354).

In those cases where no new beneficiary has become entitled after the 1967 Special Saving Clause took effect the only action necessary is to raise the rates of the 216(h)(3) child (or) to a rate equal to that of the other child beneficiaries. Although this adjustment will cause an additional increase in the family benefits payable under the saving clause,

Transitional Provisions

If childless and eligible for benefits under the 1967 PIA, and if the deceased, the spouse of the deceased, and the child(ren) are entitled to benefits under the 1967 PIA, and if child equal share of the family maximum is equal to or less than the child's share of the family maximum (see Case 1 below.)

Where additional beneficiaries have been entitled to benefits under the 1967 Special Saving Clause, your will or trust may provide that the amounts paid in the usual manner. This is, they will be paid under the rules of the established family maximum, or failing that, first to the child who has the most family benefits payable. The benefit rates for the additional spouses saved by the 1967 Special Saving Clause (not dependent children and above) are not protected against a subsequent reduction if the child becomes a non-beneficiary because entitled. If the new beneficiary is a 215(a)(3) child determine the rate for the benefit amounts originally protected by the 1967 Special Saving Clause as if the newly entitled beneficiary was legitimate. Then adjust the rates of the other 215(a)(3) children entitled in or before the 1967 Special Saving Clause each officer to equal the rates of the "saved" children. (See case 2 for an example of this procedure.)

If the rates currently being paid for any beneficiary will be reduced as a result of this procedure, the losses resulting from such reductions. The rules of administrative finality may apply in limited cases but if subsequent claimants are not protected by the 1967 Special Saving Clause, but are found to be entitled more than 4 years prior to finalization of the case. Apply the rules in § 1314 for determining the rates for these beneficiaries.

The following examples illustrate how these procedures should be applied:

CASE 1:

The wife died on 9/12/67. Her widow and two legitimate children filed for benefits in 11/67. The wife's legitimate children also listed as 215(a)(3) children in November. All five beneficiaries are still entitled. The entitlement history looks like this:

	1965 PIA \$121.00	1967 PIA \$136.88	1969 PIA \$157.40	1971 PIA \$173.20	1972 PIA \$177.50
D	\$1.00	101.00(2/68)	116.88(1/70)	126.60(1/71)	134.40(9/72)
C1 (legitimate)	\$1.00	102.00	117.92	127.80	135.10
C2 (legitimate)	\$1.00	101.00	116.92	125.60	133.30
C3 (215(a)(3))	\$1.00	61.00	76.80	77.40	84.50
C4 (215(a)(3))	\$1.00	61.00	76.80	77.40	82.50
Total Family Benefits	\$6270.00	\$127.00	\$191.30	\$240.60	\$349.00
(Family Maximum Table of Saving Clause)	\$269.00	*\$305.50	*\$321.50	*\$387.00	*\$464.50

CASE 1:

The rate for each child(1) will be determined by the sum of a legitimate child's consecutive entitlements starting at age 17.

	1965 PMA \$121.00	1967 PMA \$133.00	1969 PMA \$151.00	1971 PMA \$173.00	1973 PMA \$197.00
B	54.00	100.50 (2/68)	115.50 (2/70)	130.50 (2/71)	137.50 (2/72)
C1 (legitimate)	54.00	100.50	115.50	130.50	137.50
C2 (illegitimate)	54.00	100.50	115.50	130.50	137.50
C3 (216(h)(3))	54.00	100.50	115.50	130.50	137.50
C4 (216(h)(5))	54.00	100.50	115.50	130.50	137.50
Total Family Benefits	\$270.00	\$308.00	\$351.50	\$393.00	\$434.50
(Family Maximum Table or "Savings Clause")	(269.50)	\$4,305.50	\$4,351.50	\$4,397.00	\$4,434.50

If C2 terminates at age 18 in 11/71, the benefit rates for B, C1, C3, and C4 would not be increased because under current law (216(h)(3)) each beneficiary's equal share of the family maximum (\$434.50 + 4 = \$108.625).

CASE 2:

Use the same facts as presented in Case 1. However, in this case two additional 216(h)(3) children start on 4/71, for benefits effective 4/70. The entitlement history looks like this:

	1965 PMA \$121.00	1967 PMA \$133.00	1969 PMA \$151.00	1971 PMA \$173.00	1973 PMA \$197.00
B	54.00	100.50 (2/68)	115.50 (2/70)	130.50 (2/71)	137.50 (2/72)
C1 (legitimate)	54.00	100.50	115.50	130.50	137.50
C2 (illegitimate)	54.00	100.50	115.50	130.50	137.50
C3 (216(h)(3))	54.00	100.50	115.50	130.50	137.50
C4 (216(h)(5))	54.00	100.50	115.50	130.50	137.50
C5 (216(h)(3))	54.00	100.50	115.50	130.50	137.50
C6 (216(h)(3))	54.00	100.50	115.50	130.50	137.50
Total Family Benefits	\$270.00	\$270.00	\$391.50	\$440.00	\$430.00
(Family Maximum Table or "Savings Clause")	(469.50)	\$4,305.50	\$4,351.50	\$4,397.00	\$4,334.50

The rates for B, and C1-C4 should be determined the same as in Case 1 up to the point of the subsequent claim (i.e. 10/1969 - 1/70). The new, retroactive 4/70 rates for all children should be applied, due to the entitlement of C5 and C6. The benefit rate for C5 and C6 is determined by dividing the established family maximum (\$430.00) equally among all 7

for information. This would be a good place to start. In addition, the City and the State of Florida have agreed to provide information on the amount of money spent by the City of Tampa on the 1987 election. The City has agreed to provide the same on the other "local" candidates. This would be a good place to start. The City and the State of Florida have agreed to provide information on the amount of money spent by the City of Tampa on the 1987 election. The City and the State of Florida have agreed to provide information on the amount of money spent by the City of Tampa on the 1987 election. The City and the State of Florida have agreed to provide information on the amount of money spent by the City of Tampa on the 1987 election. The City and the State of Florida have agreed to provide information on the amount of money spent by the City of Tampa on the 1987 election.

The corrected contributions history looks like this:

	1985-1986 Actual	1987-1988 Actual	1988-1989 Actual	1989-1990 Actual	1990-1991 Actual
01	\$100.00	\$100.00(2/13, 2/11/89, 1/1/90) \$100.00(4/1/90)	\$100.00(4/1/90)	\$100.00(4/1/90)	\$100.00(4/1/90)
01 (legitimate)	\$100.00	\$100.00	\$100.00 \$100.00	\$100.00	\$100.00
02 (legitimate)	\$100.00	\$100.00	\$100.00 \$100.00	\$100.00	\$100.00
03 (216(h)(3))	\$100.00	\$100.00	\$100.00 \$100.00	\$100.00	\$100.00
04 (216(h)(3))	\$100.00	\$100.00	\$100.00 \$100.00	\$100.00	\$100.00
05 (216(h)(3))				\$100.00(4/1/90)	\$100.00(4/1/90)
07 (216(h)(3))				\$100.00(4/1/90)	\$100.00(4/1/90)
Final Totals					
Sums	\$100.00	\$100.00	\$100.00	\$100.00	\$100.00
Family Maximum Total or Working Classics)		\$1000.00	\$1000.00	\$1000.00	\$1000.00

SECTION OF INVESTIGATIVE PROCEDURE

Upon a revision of the law for judicial reconsideration, it is to be the preference of the City of Tampa to continue to implement Article 10 of the unconstitutional provisions in connection with the use of the law. In evidence, we can see that the City of Tampa has implemented a procedure that is nothing but a copy of Title 10. Additionally, the City of Tampa has the evidence to support this because of the fact that certain legislation can be introduced in the manner that the determination will take. At present, the option of not taking up an alternative to the original article for the time being is to be considered. The use of Article 10 of the Constitution has been, in general, an issue of concern to the City of Tampa. It is to be noted that the balance of the Constitution does not allow for the use of Article 10 to be reduced to the same originally intended by the City of Tampa. It will be proposed that a City Law be passed to be used in these circumstances.

11-1972

A claim of entitlement occurs when one or more of the following conditions are met:
 section 203(a), or section 203(b)(3) of the actuarial table, or the protected benefit amounts collected by the date of the claim, or the date of the claim.
 Thus, the entitlement of an additional beneficiary on the R/R involved, or the simultaneous entitlement of one or more of the beneficiaries on the R/R or other R/R's, would require recompensation of the protected benefit amounts to reduce them correctly. On the other hand, the simultaneous entitlement of a beneficiary on the R/R could result in an increase, not a reduction so that the protected rate is not affected adversely.

In addition, although the original determination as to entitlement may be beyond reach for correction, any error on the date of the evidence would affect later recomputations and conversions. These claims established within 4 years of the date the cases are filed, and are within reach and must be reopened and corrected (even though they seemed correct when filed) just as the rate would be if it contained an actual clerical error in the recomputation or conversion computation. This reflects the court's decision that section 203(a)(3) as unconstitutional requires the administration (except to the extent administrative finality specifically protects a benefit rate) to correct all rates as if the section 203(a)(3) limitation was never in existence). However, benefit conversion and recompensation amounts may only be reduced to amounts which are protected under the rules of administrative finality (see § 705-i).

Cases will be considered to have been "identified," for purposes of applying administrative finality, as of 12/31/72, the date the listing of cases on the MBR was forwarded to BRSB. Of course, if the case came to the attention of the reviewing office or DC prior to this date, the earlier date will be used.

Below are examples of when and how administrative finality will apply:

Case 1:

The WB died on 3/5/68. Three legitimate children became entitled to \$14.20 each in 3/68 based on a PIA of \$65.00. Two illegitimate children also became entitled in 3/68, but their benefit amounts may be \$0.00. All claimants were notified of their entitlements on 4/27/68, and all five children remain entitled. The entitlement history looks like this:

	1967 PIA	1969 PIA	1971 PIA	1972 PIA
C1 (legitimate)	\$ 63.40	\$102.70	\$111.50	\$134.30
C2 (legitimate)	\$ 63.40	\$102.70	\$111.50	\$134.30
C3 (legitimate)	\$ 63.40	\$102.70	\$111.50	\$134.30
C4 (215(l)(3))	\$0.00	\$0.00	\$0.00	\$0.00
C5 (215(h)(3))	\$0.00	\$0.00	\$0.00	\$0.00
 *Family Maximum able or *Saving clause)	 \$132.60	 \$152.70	 \$166.00	 \$181.60

The sum of the two legitimate children's benefits for enrollment in all five children would be \$120.00 plus \$16.00. However, the date of the original benefit for the first legitimate child 4 years from the date of birth of the second legitimate child, or 4/17/69, was a mistake and it should be corrected. Legitimate benefit cannot be reduced due to administrative finality. However, these amounts may now be converted to retroactive amounts until such time as the family maximum benefit is reached. Corrections made within 4 years of the date the case is determined may be reopened and revised with respect to the legitimate or illegitimate children. Their individual benefit amounts may not be reduced below the amounts protected by administrative finality. The corrected enrollment history looks like this:

	1967 PIA \$ 65.40	1969 PIA \$101.70	1971 PIA \$112.50	1972 PIA \$134.30
C1 (legitimate)	44.20(3/68)	44.20(1/70)	44.20(1/71)	44.20(9/72)
C2 (legitimate)	44.20	44.20	44.20	44.20
C3 (legitimate)	44.20	44.20	44.20	44.20
C4 (216(h)(3))	26.60	30.00	33.70	40.50
C5 (216(h)(3))	26.60	30.00	33.70	40.50
Total Benefits Payable	\$185.80	\$193.00	\$200.00	\$213.60
(Family Maximum Table or *Savvy Clause)	\$132.60	*\$153.00	*\$168.50	*\$202.50

CASE 2:

Use the same facts as presented in Case 1. However, in this case an additional legitimate child was born on 4/17/71 for benefits effective 1/70. The enrollment history looks like this:

	1967 PIA \$ 65.40	1969 PIA \$101.70	1971 PIA \$112.50	1972 PIA \$134.30
C1 (legitimate)	44.20(3/68)	50.50(1/70)	42.00(1/71)	50.40
C2 (legitimate)	44.20	50.50	42.00	50.40
C3 (legitimate)	44.20	50.50	42.00	50.40
C4 (216(h)(3))	00.00	00.00	00.00	00.00
C5 (216(h)(3))	00.00	00.00	00.00	00.00
C6 (legitimate)	—	50.50(4/70)	42.00	50.40
(Family Maximum Table or *Savvy Clause)	\$132.60	*\$152.70	*\$168.00	*\$201.60

CASE 2:

ENTITLEMENT HISTORY

1967-1972

The rules to the top of 216(4)(3) apply here. Note that all children have to share equally in the family maximum. Thus, the section 202(j)(1) must be applied as usual.

The 3/68 rule is protected as in Case 1. However, the 4/70 reduction has been taken into account when calculating the benefit period. Therefore, beginning 4/70, the rates can be converted from 1968 dollars and converted to 1971 and 9/72. The converted entitlement history looks like this:

	1967 PIA \$ 33.40	1969 PIA \$161.70	1971 PIA \$162.50	1972 PIA \$164.50
C1 (legitimate)	44.20(3/68)	50.50(4/70)	55.00(1/71)	55.00
C2 (legitimate)	44.20	50.50	55.00	55.00
C3 (legitimate)	44.20	50.50	55.00	55.00
C4 (216(4)(3))	26.60	30.50	30.50	30.50
C5 (216(4)(3))	26.60	30.50	30.50	30.50
C6 (legitimate)	—	25.50(4/70)	28.00	28.00
Total Benefits Payable	\$185.80	\$193.80/\$153.00	\$160.60	\$202.80
(Family Maximum Table or "Saving Clause")	\$132.60	*\$153.00	*\$163.50	*\$202.80

CASE 3:

Use the same facts as presented in Case 1. However, in this case an additional 216(4)(3) child has ruled on 4/4/72 for benefits effective 4/70. The entitlement history looks like this:

	1967 PIA \$ 33.40	1969 PIA \$161.70	1971 PIA \$162.50	1972 PIA \$164.50
C1 (legitimate)	44.20(3/68)	50.50(4/70)	55.00(1/71)	57.50(9/72)
C2 (legitimate)	44.20	50.50	55.00	57.50
C3 (legitimate)	44.20	50.50	55.00	57.50
C4 (216(4)(3))	00.00	00.00	00.00	00.00
C5 (216(4)(3))	00.00	00.00	00.00	00.00
C6 (216(4)(3))	—	25.50(4/70)	28.00	30.00
(Family Maximum Table or "Saving Clause")	\$132.60	*\$153.00	*\$163.00	*\$201.60

This case is treated similarly to Case 3 above except that the child was born on 1-1-68 and thus would be entitled to a reduction of benefit rates. Since there are children in residence, the benefit reduction uses the legitimate children and provides for administrative flexibility.

The corrected entitlement history looks like this:

	1967 PEA \$ 66.40	1968 PEA \$124.70	1971 PEA \$124.50	1972 PEA \$134.80
c1 (legitimate)	44.00(3/68)	74.00(1/70)	74.00(1/71)	74.00(9/72)
c2 (legitimate)	44.00	74.00	74.00	74.00
c3 (legitimate)	44.00	74.00	74.00	74.00
c4 (216(h)(3))	26.60	30.00(1/70) 20.00(1/71)	20.00	33.00
c5 (216(h)(3))	26.60	30.00 20.00	20.00	31.00
c6 (216(h)(3))	—	20.00(4/70)	20.00	—
Total Benefits Payable	\$185.00	\$193.00/(legit) (\$16.00)	\$168.60	(\$234.00)
(Family Maximum Allow or *Saving Clause)	\$132.60	\$153.00	*\$168.60	*\$205.60

Case 4:

A current claim is being adjudicated for two 216(h)(3) children. Three legitimate children are currently entitled and have been entitled since 3/68.

In this case, the 216(h)(3) children are treated the same as a legitimate child. The benefit rates of the three legitimate children will be adjusted due to the entitlement of the two 216(h)(3) children in the same manner as any other late filer adjustment. Section 204(g)(1) will apply.

T315. NOTICE OF REDUCED BENEFITS

Beneficiaries whose benefits are to be reduced must be so notified before the reduction is made. This notice should show the exact section of 216(h)(3) applicable to the case and the exact basis for our determination. For example, if a 1968 income tax return was used as proof of written acknowledgement, the notice should show this. The notice should follow this format (subject to modification to fit a particular set of circumstances):

A person's child or children are defined as the child or children of the mother's child(ren) who are living.
Record must contain information concerning the number and identification of children living at the time of the record.
Therefore, it will be from the record of the number of children
and amount of time the child(ren) has been living at the time of the record.
This record is necessary to determine the number of children under
216(a)(3) children. These children will be considered to be the child(ren) of
216(a)(3) applicable until the child(ren) has been determined.

If you have established paternity and the dependent child is under age qualify for benefits, you may file a claim for other benefits. Your benefits will be offset by amounts you receive from your former wife or ex-wife. If you have established paternity and the dependent child is under age qualify for benefits, you may file a claim for other benefits. Your benefits will be offset by amounts you receive from your former wife or ex-wife.

In these cases the notice will be mailed directly to the payee (or payee), and will not need a return address on the envelope. The return address will be given on the first page of the notice. The identification identifies "Your wife or ex-wife can claim the additional benefit if she is enclosed with the notice which concerns the reconciliation paragraph 216. MAINTAINING OR CANCELLING

As a result of the retroactive effects of the court decision, new units will be created. However, recovery of overpayments will be waived if fault will be waived because the benefit will be found to be "without fault" and recovery will be deemed to be "against equity and good conscience" (see §§ 5547.1 and 5548). A brief waiver summary should be prepared. Where all beneficiaries reside in the same household or have one said representative offset any overpayment against the underpayment. Any resulting overpayment that cannot be offset should be waived on the same basis as above.

For statistical purposes on SSA-5096, Claim Waiver Statistics Data Card should be completed for each waiver action. The action should be coded "Ent. 0/216." At the bottom of the card enter briefly the action by showing "216(h)(3)." On the reverse side of the card show the following information for each case:

1. The total amount of the increase in benefits payable to the 216(h)(3) children for the retroactive period. Do not include any payments made to 216(h)(3) children whose benefits are being increased due to the 1967 Special Saving Clause. This amount will be reported as described in the final paragraph below.

2. Whether the benefits payable were charged against the CASH or DI Trust Fund. If both funds were involved show the breakdown by fund.

Send completed data cards to ERB, ATTN: Division of Benefit Computation, Administration Building within the first week of each month (see § 5542).

In cases involving the 1967 Special Saving Clause there will be an increase in the total family benefit amount in excess of the family size adjustment listed for that case. In some cases the prevailing cities must keep a record of the amount of the increase payable for the retroactive period to the 216(h)(3) children when the benefits are adjusted. At the end of each

2011(1971)

Amounts charged should be determined by the amount of time spent
on the contract, following the hours worked by the contractor, and
retroactive period unless otherwise paid. The total amount should be
billed to the CAGE thrust fund or the project funds. Billing by SBA is
not required.

U.S. DISTRICT COURT, FOR THE
EASTERN DISTRICT OF NEW YORK
CLAUDETTE FROST, ET AL.,
Plaintiffs,

73 C 1383

-against-

CASPAR WELCHERGREN, as Secretary of
the United States Department of
Health, Education and Welfare,

Defendant.

STATEMENT PURSUANT TO
LOCAL RULE 9(a)

1. On August 21, 1968 Charles Frost, Jr. died a fully insured individual.

2. Plaintiff filed an application for mother's insurance benefits on behalf of herself and child's insurance benefits on behalf of James and Kristen Frost as legitimate children of the deceased wage earner. Plaintiff stated that she and her husband had been separated for three years and it was her understanding that he had "remarried" Lola Coolidge (Frost) and had a child by her.

3. It was determined by the Social Security Administration that plaintiff's deceased husband had two illegitimate children named Charles E. and Tina L. Frost. This determination was based on the fact that plaintiff's husband was living with one of the children and Lola Coolidge (Frost) who was pregnant with the second child at the time of his death and he was named as the father of the two children on their birth certificates.

4. On May 15, 1969 plaintiff was informed that she must present documentary evidence that these children were not illegitimate children of her deceased husband or the determination would stand. Plaintiff was unable to produce any such evidence.

5. The provision of section 203(a)(3) of the Social Security Act, 42 U.S.C. 403(a)(3) which provided that illegitimate children entitled to benefits under section 210(a)(3) would receive benefits only to the extent that the family maximum was not being paid was declared unconstitutional as arbitrarily discriminating against these illegitimate children. Since benefits henceforth had to be apportioned equally to the eligible children of a wage earner whether or not they were legitimate, the benefits payable to some legitimate children necessarily had to be reduced.

6. Thus, on February 15, 1972, notice was sent to plaintiff informing her of the court decision and the fact that the benefits to her and her two children would be reduced because of the required payment to the two illegitimate children of her deceased husband. This notice further informed plaintiff that it appeared that Charles Frost, Jr. was living with Charles Frost III and the illegitimate children's mother who was pregnant with Tina Frost at the time of his death. Plaintiff was also notified that her husband was listed as the father of the children on their birth certificates. Plaintiff was furthermore encouraged by this notice to submit, within 30 days, evidence showing that the named illegitimate children did not qualify under the court decision or for some other reason the legitimate children's benefits should not be reduced. Moreover, she was apprised by this notice that the nearest social security office would assist her by answering questions or by helping her submit evidence.

7. On February 22, 1973 plaintiff filed a request for a hearing regarding the apportionment of benefits to the legitimate children of Charles and Tina Frost, and plaintiff asserted that Charles and Tina Frost were not actually married at the time of her birth, for the reasons that:

(a) witness for psychological or physiological reasons, her husband had become impotent as a result of a fistula in 1916; and (b) he was never married to anyone else and both Charles (Frost) was simply using his wife as shown by the birth certificates of the children and the death certificate of Charles Frost, Jr.

8. After additional evidentiary development during which plaintiff stated, I have no proof to show that my husband was impotent at the time Tina and Charles were born, a reconsideration determination issued May 2, 1973 held that equal apportionment of benefits among the four children with the consequent reduction of benefits for the two legitimate children was proper.

9. In accordance with the court decision requiring equal apportionment of benefits among eligible legitimate and illegitimate children, benefits payable to the legitimate children of Charles A. Frost, Jr. were reduced beginning with the month of June 1973.

10. On May 16, 1973, plaintiff filed a request for a hearing. However, before a hearing could be scheduled plaintiff filed civil action on September 17, 1973 in the United States District Court for the Eastern District of New York.

11. A hearing was held by the Social Security Administration on November 27, 1973.

12. At the close of the hearing, plaintiff's attorneys requested additional time to submit additional evidence, and/or to make further legal argument by means of a post hearing memorandum.

13. By reason thereof, no decision has yet been made subsequent to the hearing.

EDWARD JOHN ROYD, V
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

By:

EDWARD M. FALKER
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,

Plaintiffs,

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,

Defendant.

Civil Action No.
73 C 1383

NOTICE OF MOTION
FOR SUMMARY JUDGMENT

SIR:

PLEASE TAKE NOTICE, that upon the amended complaint herein and the answer thereto, the annexed statement pursuant to General Rule 9(g), and all prior proceedings herein, the plaintiffs will move this Court before the Honorable Anthony J. Travia, United States District Judge, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York 11201, at 10:00 o'clock in the forenoon on the 8th day of March, 1973, or as soon thereafter as counsel can be heard for an order granting them summary judgment for the relief demanded in the amended complaint and for such other and further relief as may seem just and proper.

Dated: February 1, 1974

Yours, etc.

Susan Savitt
SUSAN SAVITT, Esq.
NASSAU LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel. 718-863-8787

Rene H. Reitach
RENE H. REITACH, ESQ.
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
139 Troup Street
Rochester, New York 14608
Tel. 716-454-6500

Attorneys for Plaintiffs

TO: EDWARD JOHN BOYD V, ESQ.
ACTING UNITED STATES ATTORNEY
Attn: Lloyd H. Baker, Esq.
Assistant United States Attorney
900 Ellison Avenue
Westbury, New York 11590
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,

Plaintiffs,

Civil Action No.
73 C 1383

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,

STATEMENT PURSUANT TO
GENERAL RULE 9(c)

Defendant.

Plaintiffs contend that there is no genuine issue to be tried with respect to the following material facts:

1. The named plaintiffs are and at all times material herein have been receiving survivors' benefits from the Social Security Administration of the United State Department of Health, Education and Welfare pursuant to 42 U.S.C. section 402.
2. The aforesaid benefits were paid to the named plaintiffs as survivors of Charles Frost, Jr., who at the time of his death on August 21, 1968, was fully insured under the Social Security Act within the meaning of 42 U.S.C. section 414(a).
3. Immediately prior to February 15, 1973, each named plaintiff was receiving these survivors' benefits in the amount of \$159.30 per month.
4. On or about February 15, 1973, the named plaintiffs were notified by the Social Security Administration that each of their grants would be reduced by \$63.60 per month, to \$95.70 per month, because two other children not living with the named plaintiffs and known to the Social Security Administration as Charles E. Frost and Tina L. Frost were now entitled

to benefits, in accordance with the maximum total benefits limitation under 42 U.S.C. section 403(a).

5. The named plaintiffs thereupon submitted a written request for reconsideration of the aforesaid decision to reduce their survivors' benefits.

6. At no time were the named plaintiffs ever advised in writing of any right to request a pre-reduction hearing; how to obtain such a hearing; of their right to confront and cross-examine witnesses against them at such a hearing; or of their right to examine documents and records to be used at such a hearing at a reasonable time prior to and during such a hearing.

7. In May, 1973, the named plaintiffs received a notice of reconsideration determination that the original decision of the Social Security Administration to reduce each of their survivors' benefits by \$63.60 per month was correct.

8. On or about May 16, 1973, the named plaintiffs requested a hearing before a hearing examiner.

9. Commencing with the benefit check for May, 1973, received by the named plaintiffs on or about June 3, 1973, the Social Security Administration reduced their survivors' benefits by a total of \$190.80 in accordance with the aforesaid findings of the Social Security Administration.

10. At the time this action was commenced by filing of a summons and complaint on September 14, 1973, no hearing on the facts underlying the reduction of the named plaintiffs' survivors' benefits had been held or scheduled.

11. The defendant is the Secretary of the United States Department of Health, Education and Welfare, and he is responsible for making rules and regulations and establishing pro-

cedures which are necessary or appropriate to carry out the provisions of the Social Security Act, 42 U.S.C. sections 401 et seq., including holding such hearings as are necessary and proper for the administration of the Social Security Act and adopting reasonable rules and regulations to regulate and provide for the extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits under the Social Security Act.

Dated: February 1, 1974

SUSAN SAVITT, ESQ.
NASSAU LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel. 516-868-8787

RENE H. REIKACH, ESQ.
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
139 Tricup Street
Rochester, New York 14603
Tel. 716-454-6500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et al.,

Plaintiffs,

-against-

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

Defendant.

Civil Action No.
73 C 1383

PLAINTIFFS'
RESPONSE TO
DEFENDANT'S 9(g)
STATEMENT

Without admitting that any of the alleged facts set forth in the Defendant's Statement Pursuant to Local Rule 9(g) are material, plaintiffs contend there is a genuine issue to be tried as to the following alleged facts:

1. Contests each and every allegation contained in paragraph 1 of the Statement, except admits that on August 21, 1963 Charles Frost, Jr. died a fully insured individual.
2. Contests each and every allegation contained in paragraph 2 of the Statement, except admits that plaintiff Claudia Frost applied for mother's insurance benefits on behalf of herself and child's insurance benefits on behalf of James and Kristen Frost as legitimate children of the deceased wage earner.
3. Contests each and every allegation contained in paragraph 3 of the Statement, except admits that the Social Security Administration at some time determined that the deceased husband of the plaintiff Claudia Frost had two illegitimate children named Charles E. and Tina L. Frost.
4. Contests each and every allegation contained in paragraph 4 of the Statement.
5. Admits each and every allegation contained in paragraph 5 of the Statement.

6. Contests each and every allegation contained in paragraph 6 of the Statement, except admits that on or about February 15, 1973, a notice was sent to the plaintiff Claudia Frost which the plaintiffs refer to for the contents thereof.

7. Admits each and every allegation contained in paragraph 7 of the Statement.

8. Contests each and every allegation contained in paragraph 8 of the Statement, except admits that a reconsideration determination was issued on May 2, 1973, which is part of the record herein and which the plaintiffs refer to for the contents thereof.

9. Contests each and every allegation contained in paragraph 9 of the Statement except admits that beginning with the payment made in June, 1973, for the month of May, 1973, benefits payable to the plaintiffs were reduced.

10. Contests each and every allegation contained in paragraph 10 of the Statement except admits that on May 16, 1973, the plaintiff filed a request for a hearing and that on September 14, 1973, before a hearing had been scheduled, the plaintiffs filed civil action in the United States District Court for the Eastern District of New York.

11. Admits each and every allegation contained in paragraph 11 of the Statement.

12. Contests each and every allegation contained in paragraph 12 of the Statement except admits that at the hearing plaintiffs' attorney requested additional time to make further legal argument by means of a post hearing memorandum.

13. Contests each and every allegation contained in paragraph 13 of the Statement except admits that no decision has yet been made subsequent to the hearing.

Dated: February 22, 1974.

SUSAN SAVITT, ESQ.
NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel: 516-868-3787

RENEE H. REIXACH, ESQ.
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL ASSISTANCE
CORPORATION
139 Troup Street
Rochester, New York 14603
Tel: 716-454-6500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et al.,

Plaintiffs,

-against-

Civil Action No.
73 C 1383

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

NOTICE OF MOTION

Defendant.

Sir:

PLEASE TAKE NOTICE, that upon the affidavit of Susan Savitt, Esq., sworn to the 14th day of February, 1974, and upon all prior proceedings herein, the plaintiffs will move this Court before the Hon. Anthony J. Travia, at the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, at 10:00 o'clock in the forenoon on the 8th day of March, 1974, or as soon thereafter as counsel may be heard, for a Temporary Restraining Order and for a Preliminary Injunction requiring the defendant to pay the named plaintiffs Social Security survivors' benefits in the amounts to which they would be entitled but for the reduction in those benefits which became effective in June, 1973, and for such other and further relief as seems just and proper.

Dated: February 22, 1974

Yours, Etc.

/
SUSAN SAVITT, ESQ.
NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
115 North Main Street
Freeport, New York 11520
Tel: 516-868-8787

5 /

RENE H. REIXACH, ESQ.
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL ASSISTANCE
CORPORATION
139 Troup Street
Rochester, New York 14608
Tel: 716-454-6500

Attorneys for Plaintiffs

TO: EDWARD JOHN BOYD V, ESQ.
Acting United States Attorney
Attn: Lloyd H. Baker, Esq.
225 Cadman Plaza East
Brooklyn, New York 11201

Attorney for Defendant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
CLAUDIA FROST, et al.,

Plaintiffs,

-against-

Civil Action No. 73C 1383

CASPAR WEINBERGER, as Secretary
of the United States Department
of Health, Education and Welfare,

AFFIDAVIT

Defendant.

-----X
STATE OF NEW YORK)
COUNTY OF NASSAU : SS.
)

SUSAN SAVITT, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and one of the attorneys for the plaintiffs herein. I make this affidavit in opposition to the defendant's motion for summary judgment, and in support of plaintiffs' motion for summary judgment and temporary relief.

2. The affidavit of Lloyd H. Baker, Esq., sworn to February 1, 1974, asserts on page 2 thereof that at the administrative hearing held to determine the various claimants' rights to benefits from the decedent's Social Security estate I requested "additional time to submit additional evidence and/or legal argument," and that as a result no decision has yet been rendered.

3. Mr. Baker's understanding of what transpired at that hearing is somewhat muddled, no doubt because he has no personal knowledge of the facts. My only request for further time was for permission to file a legal memorandum. I did not request time to submit any additional facts. At the hearing Judge Shaprio

suggested I submit a memorandum rather than make oral legal argument. The importance of that memorandum is obvious; it dealt with the question of whether the birth certificates purporting to name the decedent as the father of the illegitimate children were in fact valid or legal proof of parentage in view of the requirements of section 4135 of the New York Public Health Law requiring a written verified consent by the father of an illegitimate child before his name can be placed on the certificate. Smith v. Department of Health of the City of New York, et al., 90 N.Y.S.2d

305. No such consents were introduced at the hearing although we requested that they be subpoenaed. The memorandum also discussed whether Charles Frost was in fact living with Lola Coolidge or providing support in terms of 20 C.F.R. Sec. 404-716 and Sec. 404-112.

4. No additional evidence was submitted after the hearing on behalf of Mrs. Frost or her children, the plaintiffs here. On the contrary, I received a letter from Administrative Law Judge S. Theodore Shapiro, dated December 11, 1973, stating that I review additional hearsay documents submitted post-hearing by Lola Coolidge, aka Frost aka Porter. I objected to these documents in person and by letter dated December 27, 1973, demanding a re-hearing for purposes of cross-examination if these documents were accepted.

5. On or about January 30, 1974, while I was away, my office received another letter dated January 28, 1974 signed by Mr. B. Dubinsky of the Freeport Social Security branch office, requesting that I contact him regarding the Frost matter.

6. On February 13, 1974 I spoke with Mr. Dubinsky and he informed me that there was yet another document submitted

by Lola Coolidge post-hearing for me to peruse and comment upon. I have again objected to acceptance of this document without the opportunity to confront and cross-examine the individual signing said letter.

7. *Although HEW regulations are clear on this issue*
We were unable to view Mrs. Frost's claims folder until the day of the hearing and yet did not demand the extra time to see the original documents and request subpoenas from HEW in the interest of a speedy decision and the plea by HEW representatives that it was difficult to bring Lola Coolidge to New York at another time.

8. Any additional comments or demands on the part of plaintiff Frost are solely in response to additional materials accepted by HEW from Lola Coolidge forcing a demand by us for the rights of confrontation and cross-examination at a hearing and all this occurring nearly three months after the original hearing date.

9. In view of the foregoing, Mr. Baker's conclusion that the Social Security Administration's delay in rendering a decision on that hearing is attributable to the plaintiffs herein is totally unwarranted.

10. In preparation of the plaintiffs' motion for summary judgment I have determined that there is a serious question as to the viability of the defendant's purported affirmative defense that the other claimants to the decedent's Social Security estate are necessary parties. The fact is that they may be beyond the area in which process may be served.

11. Prior to the class action motion in this action I was informed that the other claimants no longer lived

in the State of New York, but in Connecticut. Subsequently, in preparation for meeting the defendant's necessary party theory, I contacted the Social Security Administration Referees' office in early January, 1974, and was advised that the other claimants now live in East Hartford, Connecticut, and that the mother of the two minor claimants is now known as Lola Coolidge Porter.

WHEREFORE, I pray that the plaintiffs' motion for summary judgment and temporary relief be granted and that the defendant's motion for summary judgment be denied.

SUSAN SAVITT

Sworn to before me this

14th day of February, 1974.

Gilda J. Beller

GILDA J. BELLER
NOTARY PUBLIC, State of New York
No. 30-0232567, Nassau County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et. al.,

Plaintiffs,

Civil Action No.
73 C 1383

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,

AFFIDAVIT

Defendant.

STATE OF NEW YORK) SS:
COUNTY OF MONROE)

RENE H. REIXACH, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein and a member of the Bar of this Court. I make this affidavit in support of the plaintiffs' motion for summary judgment.

2. In the defendant's answer there was raised an alleged affirmative defense that the other claimants to the decedents' Social Security estate were necessary parties to this action.

3. Inasmuch as Rule 19(a) of the Federal Rules of Civil Procedure pertaining to persons to be joined if feasible applies by its terms only to "a person who is subject to service of process," the defendant's necessary party theory must obviously fail if those other claimants are not subject to service of process.

4. As heretofore set forth in paragraph 4 of my affidavit of December 21, 1973, counsel for the plaintiffs have

been informed by the Social Security Administration that those other claimants, namely Lola Coolidge and her children heretofore described in this action as Charles E. Frost and Tina L. Frost, now reside in Connecticut. As the affidavit of Susan Savitt, Esq., submitted herewith, states, it has been determined that those other claimants reside in East Hartford, Connecticut.

5. Inasmuch as East Hartford, Connecticut, is not "within the territorial limits of the state in which the district court is held" in this action, service under that provision of Rule 4(f) of the Federal Rules of Civil Procedure would not be effective. The only alternative means of effective service known to counsel for the plaintiffs under Rule 19 and Rule 4(f) would be if those other persons resided "not more than 100 miles from the place in which the action is commenced."

6. Accordingly I have inquired of the American Geographical Society, a professional society of geographers, whether or not East Hartford, Connecticut is within or without a 100 mile radius from the Federal Courthouse in Brooklyn, New York. A copy of that inquiry is annexed hereto as Exhibit "A".

7. After the plaintiffs' summary judgment motion papers had been served I received a reply to that inquiry, a copy of which is annexed hereto as Exhibit "B".

8. That reply states, in relevant part, that an arc drawn on a 100 mile radius from this Court "cuts right through East Hartford." That arc, which I have drawn based on the 25 1/2 inch scale radius described in the reply to my inquiry, is shown on the third of the four maps annexed to that reply. The arc is shown as the line between two triangles drawn on the map, and based on that drawing it appears that only a very small portion

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of East Hartford, in the south eastern corner thereof, is within 100 miles of this Court.

9. The exact address of those other claimants is known only to the Social Security Administration, and in view of the foregoing it seems most likely that the other claimants would not be subject to service in this action. It is respectfully submitted that in view of this those other claimants should be deemed not to be subject to service unless the defendant, who alone has the necessary information about their exact address can show that they are subject to service.

WHEREFORE, I pray that the plaintiffs' motion for summary judgment be granted.

S/
RENE H. REIXACH

Sworn to before me this
22nd day of February, 1974.
J/

STEPHAN A. LANDMAN
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1974

January 29, 1974

American Geographical Society
Broadway and 156th Street
New York, New York 10032
ATTN: Mrs. Murphy, Map Dept.

Dear Mrs. Murphy:

As we discussed over the telephone yesterday morning, I am trying to determine whether an arc drawn on a radius of 100 miles from the federal courthouse in Brooklyn intersects any portion of East Hartford, Connecticut, or alternatively whether East Hartford lies entirely inside or outside of that 100 mile radius.

The federal courthouse in Brooklyn is located at 225 Cadman Plaza East. This is near the intersection of Court Street and Cadman Plaza by Brooklyn Heights.

I would appreciate your checking this for me and letting me know where this 100 mile radius falls with relation to East Hartford. If it cuts through East Hartford, I would appreciate your sending a copy of the relevant map showing where the line falls. I will need this information by February 15. Please let me know if there is any charge.

Sincerely yours,

Rene H. Reixach

RH/R/Re

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American Geographical Society

BROADWAY AT 156TH STREET, NEW YORK, N.Y. 10032

(212) 234-8100

February 4, 1974

Mr. René H. Reixach
Monroe County Legal Assistance Corp.
Greater Up-State Law Project
139 Troup Street
Rochester, New York 14603

Dear Mr. Reixach:

In reply to your letter of January 29, 1974, I am sending you xerox copies of the map

TRI-STATE METROPOLITAN REGION
AND ENVIRONS
by the Regional Plan Association,
1965 1:250,000

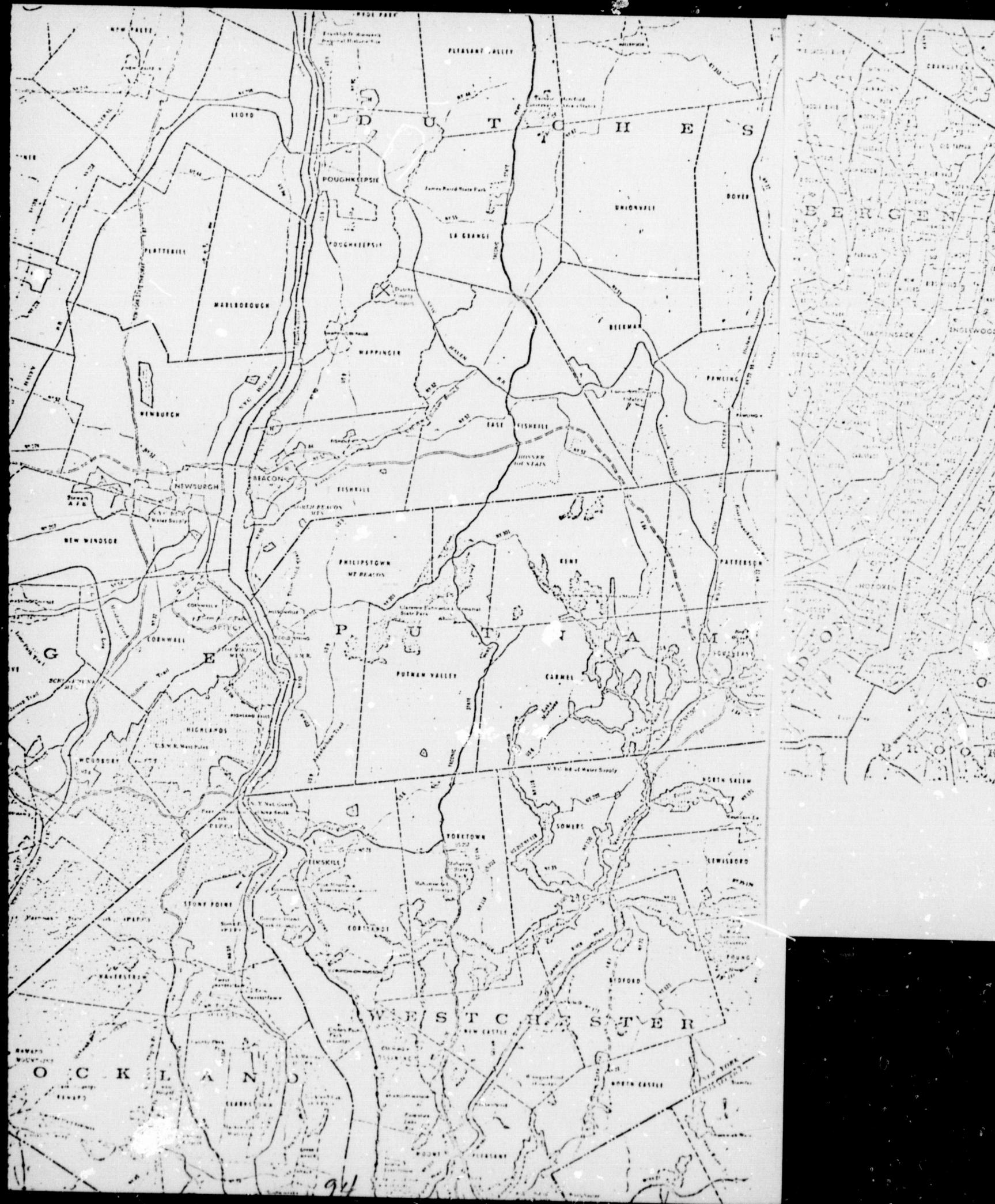
One inch on this map represents 3.95 miles. As you will see, the distance between the Federal Court House in Brooklyn and East Hartford, Connecticut, on this map is approx. 25 1/2 inches, which are about 100 3/4 miles. The arc of the 100 mile radius cuts right through East Hartford.

I am enclosing our invoice in the amount of \$4.00 for the xerox copies, postage and handling.

Sincerely,

Monika Murphy
Mrs. Monika Murphy
Ass't. to the Map Curator

encl.









L o n g

I s l a n d

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DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING DECISION

In the case of

Claudia Frost
(Claimant)

Charles Frost (deceased)
(Wife Deceased/Leave blank if same as above)

Claim for

Child's Insurance Benefits

066-24-1032

(Social Security Number)

This case is before the Administrative Law Judge upon request for hearing filed on May 16, 1973, by Claudia Frost, the claimant, who disagrees with the determination of the Social Security Administration that she is entitled to reduced insurance benefits.

The claimant, on August 26, 1968, filed with the Administration applications to establish Mother's and Child's Insurance Benefits which was granted effective August 1968. On April 9, 1969, Lola C. Frost filed an application on behalf of Charles and Tina Frost, which was granted under the 1972 Amendments, effective March 1973, resulting in a reduced amount of benefits to Claudia Frost and to the children, James H. and Kristin. Notice was given to the claimant by letter dated February 15, 1973 in which she was notified of the applicable court decision. The claimant requested reconsideration on February 22, 1973. Notice of disallowance after reconsideration was given to the claimant by letter dated April 10, 1973. The claimant disagreed with the Administration's reconsidered determination and requested a hearing.

At a hearing held November 27, 1973 in Jamaica, New York, Claudia Frost, the claimant, appeared personally and testified. The claimant, Claudia Frost, was represented by Susan Devito, Esq., of Nassau County Law Services Committee, Inc., without legal fee. Lola Cecilia Frost Porter also appeared and testified as an adverse claimant. The hearing was closed but the record was kept open for a period of one month to give Claudia Frost's attorney an opportunity to submit a brief. Subsequently a brief was submitted and both claimants also submitted additional exhibits. The additional exhibits were examined by counsel who commented the hearing of evidence and a continued hearing. Since this decision is based on the

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evidence submitted at the hearing, the necessity for subpoenas and continued hearings is obviated.

The general issue to be determined is whether or not Charles E. and Tina L. Frost have the status of "children" of the deceased wage earner, within the meaning of Section 202 of the Social Security Act, as amended.

The specific issue on which findings will be made and conclusions will be reached are whether Charles E. and Tina L. Frost have the status of "children" of the deceased wage earner, within the meaning of Section 216(h) of the Social Security Act, as amended.

Section 202(C) of the Social Security Act provides that every child of an individual who died fully insured will be entitled to a child's insurance benefit provided:

1. An application for benefits has been filed
2. At the time of filing, the child was unmarried, under 18, or a full time student if over 18, or disabled prior to age 18, and
3. Was dependent upon the insured individual at the time of that individual's death.

Section 216(e) of the Social Security Act provides that the term "child" means:

1. A child or legally adopted child of an individual or
2. A stepchild

Section 216(h)(2)(A) of the Social Security Act provides that when determining the status of an applicant as a child, the Social Security Administration shall apply such laws as would be applied by the courts of the State of domicile of the deceased at the time of his death as would be applied relative to the taking of intestate personal property. Applicants who would have the status of relative to the taking of intestate personal property or a child shall be treated such.

Section 216(h)(2)(B) of the Social Security Act provides that where an applicant does not have status under Section 216(h)(2)(A), he will be deemed a child if the child's father and mother went through a marriage ceremony that would have resulted in a purported marriage but for them in fact for the existence of a legal impediment to their contracting a valid marriage.

Section 216(h)(2) of the Social Security Act provides that when an applicant is not the child under the provisions of Section 216(l)(2), he or she shall nevertheless be deemed the child of the insured if:

1. The individual acknowledged in writing that the applicant is his son or daughter.
2. The applicant was decreed by a court to be the son or daughter of the insured individual.
3. The insured individual was ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter, or
4. The insured individual is shown by evidence satisfactory to the Social Security Administration to be the father of the applicant and was living with or contributing to the support of the applicant at the time of the insured individual's death.

Section 213(a) of the Social Security Act provides that there will be a maximum benefit payable under any one benefit. This provision will limit the total benefits payable by the Social Security Administration to the total provided in this section of the Social Security Act.

Section 203(a) of the Social Security Act provides that the Social Security Administration shall have the power and authority to make rules and regulations and to establish procedures which are necessary and appropriate to carry out the provisions of Title II of the Social Security Act. The Administration shall also provide for the nature and extent of the powers and authority necessary in order for an applicant to establish his right to benefits.

The pertinent evidence can be summarized as follows:

In her application for Mother's Insurance Benefits, filed August 25, 1968, the claimant, Claudia Frost, indicated her date of birth as May 10, 1940; that she and her ex-husband were married on August 14, 1948 and had been separated for 3 years prior to his death on August 21, 1968. "My husband and I have been apart for the past three years. I have never secured a divorce from him and I never received notification of a divorce" (Exhibit 1).

In her application for Surviving Child's Insurance Benefits, filed August 26, 1968, Claudia Frost stipulated that there were two children, James, born August 6, 1964 and Kristian, September 13, 1965 and that the children were not living with the wage earner at the time of his death but were living with her in Baldwin, New York (Exhibit 2).

Application for Child's Insurance Benefits, filed August 26, 1968, by Lola Coolidge Frost, shows that at the time of the wage earner's death, they had one child, Charles Edward Frost, III, born October 12, 1967. Under Remarks she noted: "I am expecting a child in March 1969. I was never ceremonially married to Charles Frost. He is still legally married to first wife. I do not know her address. She has two minor children and one child that is not his. * * * (Exhibit 3).

Application for Surviving Child's Insurance Benefits, filed by Lola C. Frost, April 6, 1969, shows the names of two children, Charles E. Frost, III, born October 12, 1967, and Tina L., born March 27, 1969, and that "Tina was not born until after his death" (Exhibit 4).

Application for Lump Sum Death Payment, dated September 4, 1968, signed by Charles S. Frost, Sr., Amityville, New York, notes the wage earner had been married to Claudia Frost in August 1963; that the wage earner and Claudia Frost separated in December 1968 due to "marital difficulty, unable to get along, no reconciliation" (Exhibit 5).

Certificate of Marriage records marriage of Charles E. and Claudia Sancinino, on the 14th of August 1963 in the State of Maryland (Exhibit 19).

Birth certificates of James Anthony Frost, born August 6, 1964 and Kristian Elizabeth Frost on September 13, 1965, show their parents as Charles Edward Frost, Jr. and Claudia Sancinino (Exhibit 20).

Certificate of Birth Registration, Albany, New York, shows Charles Edward Frost, III, born to Charles Edward Frost II and Lola Margaret Coolidge, on October 12, 1967 and Tina Louise Frost born to Charles Edward Frost and Lola Margaret Coolidge on March 27, 1969 (Exhibits 21 and 22).

Statement signed by Claudia Frost, February 22, 1973, states in pertinent part: "Early in 1968 he was involved in a fight, as a result of that fight he became impotent, I do not know whether he had this condition due to physical or emotional causes. He had some psychological problems and was discharged

from the Navy due to unsuitability. My main reason therefore as to why Charles Frost Jr., did not have children by anyone is the result of his impotence. My second reason is that my husband was never married to anyone else. The fact that his name is shown on the birth certificates of Tina and Charles E. Frost III is not evidence that he is their father. The mother of those children, Lola Coolidge, was using the last name of Frost, as shown by his death certificate in which she listed herself as his wife. As there is no evidence of legal paternity those children should not be considered as my husband's. Because of this my children and I should not be penalized" (Exhibit 22).

The death certificate, dated August 22, 1968, indicates that the wage earner, a construction worker, died accidentally as the result of an automobile accident. It also indicates that he was married; that Lola Coolidge was the surviving spouse, and that Lola Frost was the informant (Exhibit 18).

Letter from George H. Miller, Registrar of Vital Statistics, Plattsburgh, New York, dated February 19, 1970, informs claimant, Claudia Frost, of the necessary action she must take to have her name substituted on their records as the wife of the wage earner (Exhibit 24).

Letter, dated February 26, 1972, from Claudia Frost, in pertinent part, indicates that "the citizen's mother, Lola Coolidge, took it upon herself to use the name of Frost, in which then the citizen automatically became Frost, without benefit of legal Paternity documents. In the event of an unwed mother the mother will come forward at the time of filling a birth certificate and ask if the father will acknowledge paternity. If he will, special papers are notarized. At this time the father's name appears on the birth certificate legally. * * * At the time of his death, Mr. Frost was residing at that particular address in order to be closer to the work he enjoyed. He was indeed paying rent for his lodgings. * * * My husband and I separated in 1964. Paradox is that year he had been in a fight, from that time on this I'm sure he would of been classified as impotent. I have no proof of this since he was afraid of undergoing medical and psychological testing. * * *" (Exhibit 23).

Statement by Claudia Frost, filed March 19, 1972, indicated that she has no proof to show that the wage earner was impotent at the time Tina and Charles were born (Exhibit 27).

Statement by Lola C., dated May 17, 1972, indicates that she had remarried on November 10, 1972, and requested that her name be changed to Porter (Exhibit 28).

Letter from the Baldwin Fire Department, May 11, 1973, records their estimate of fire at the home of Claudia Frost (January 14, 1969) "the \$100, building damage and \$300 contents damage" (Exhibit 20).

Letters by Charles Bischl and Mrs. Elisa J. DiDomenico, dated May 23 and May 24, 1973, respectively, state that they were friends of the wage earner and of Claudia Frost and attest to the claimant and wage earner living together at the Baldwin address and that the wage earner never mentioned living anywhere else or with anyone else (Exhibits 30 and 31).

Letter from claimant, Claudia Frost, dated May 23, 1973, encloses the letter from the Fire Department, (Exhibit 20) to verify her previous statements that "different correspondence had been destroyed by fire in her home" (Exhibit 32).

Letters dated March 3, 8, 17, 29, and April 7, 1967 from Charles Frost Jr., Valleyville, New York, to Miss Lola Crookshank, Jay, New York were signed "Charlie Frost" and/or postscripted with the notation, "Your future husband", or "Lola, My Future Wife". In the letters the wage earner admonished the claimant to be true to him as he would go to jail over her. He asked about the baby and hoped "you and the baby stay in good health because I love you both more than anything in the world and will get an easement as soon as I can", and suggested it would take about a month to accomplish everything out. He told her about his solitary life with his parents, his difficulties with the job in the furniture warehouse, as climbing heights made him dizzy, and frequently reiterated "Please don't run out on me". Also "I can honestly say that I haven't seen my wife and she is the farthest person from my mind" and that he was making arrangements to pay \$200 to Koch for a divorce. (Exhibits 33, 34, 35, 36, 37)

In letter dated March 3, 1967 the wage earner stated: "I forgot to ask in the beginning of the letter how you and my son are * * *" (Exhibit 34).

This case involves whether the claimant, Claudia Frost, is entitled to succeeded insurance benefits. On August 11, 1963 Charles Frost Jr. died a fully insured individual. The Social Security Administration determined that the deceased was survived by a widow, Claudia Frost and four children: James A., Kristina M., Charles S., and Tina A. Frost. The letter two children were born out-of-wedlock to Mr. Frost and Lola Crookshank. Under the applicable provisions of the Social Security Act in effect at that time, there were no benefits payable to these two children. The provisions of the Social

Security Act that prohibited payment to children born out-of-wedlock was declared unconstitutional and the Social Security Administration was instructed by the courts to treat such entitled children the same as all other entitled children. As a result of this decision, social security benefits could not be denied children who were otherwise entitled to benefits. On February 15, 1973 notice was sent to Claudia Frost informing her of the court decision and the fact that the benefits to her and her children would be reduced because of the payment of benefits to the two children born to Charles Frost Jr. and Lola Coolidge. On February 22, 1973 Claudia Frost filed a Request for Reconsideration protesting the decision to reduce the benefits payable to her and her children. Although Claudia Frost disputed the decision she has not submitted any evidence to support her contention. As a matter of fact the converse is true. In letter dated March 3, 1967 from Charles Frost Jr. to Lola Coolidge, he stated "I forgot to ask in the beginning of the letter how you and my son are...." (Exhibit 34). At the hearing Lola Coolidge testified that wage-earner, Charles Frost Jr. admitted her to the hospital at the time she had her child and he signed her in as married to him. That the wage-earner resided with Lola Coolidge and supported her and the child from November 1966 to August 21, 1968.

Therefore, the Administrative Law Judge finds that Charles S. and Tina L. Frost have the status of 'children' of the deceased wage-earner within the meaning of Section 210(h)(3) of the Social Security Act.

It is the decision of the Administrative Law Judge that the determination to reduce the monthly benefits payable to Claudia Frost, James A. Frost and Kristin S. Frost is correct and that the children Charles S. and Tina L. Frost share in the benefits.

Dated: March 4, 1974

Theodore Shapiro

S. Theodore Shapiro
Administrative Law Judge

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Claudia Frost

001-26123

(Social Security Number)

Charles Frost (deceased)

(W.D. Death Report and Application)

EXHIBITS

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Application for Mother's Insurance Benefits, filed August 26, 1973 (Claudia Frost)	4
2	Application for Surviving Child's Insurance Benefits, filed August 26, 1973 (Claudia Frost)	4
3	Application for Surviving Child's Insurance Benefits, filed August 26, 1973 (Lola Goodridge Frost)	4
4	Application for Surviving Child's Insurance Benefits, filed April 6, 1973 (Lola C. Frost)	4
5	Application for Lump-Sum Death Payment, filed September 6, 1973 (Charles H. Frost Esq.)	4
6	Application for Social Security Account Number, dated June 12, 1959	1
7	Certificate of Social Insurance Award, dated October 13, 1973	1
8	Certificate of Social Insurance Award, dated October 13, 1973	1
9	Certificate of Social Insurance Award, dated October 13, 1973	1
10	Letter from Social Security Administration, to Lola C. Frost, undated, Requesting record	1
11	Letter from Social Security Administration, to Lola C. Frost, dated April 9, 1973	1
12	Request for Reconsideration, dated February 23, 1973, by Claudia Frost	1
13	Letter from Social Security Administration, to Lola Frost, dated April 17, 1973	1
14	Letter from Social Security Administration, to Lola Frost, dated April 17, 1973	2

Claudia Frost

CGG-34-1022

2

Claudia Frost (deceased)
Wife of James Anthony Frost

EXHIBITS

EXHIBIT No.	DESCRIPTION	NO. OF PAGES
15	Notice of Recomprobation Determination, dated May 2, 1973	5
16	Bernard's Certification, certified August 23, 1968	1
27	Statement of Death Statistics by Funeral Director, dated September 12, 1973	1
18	Death Certificate, Charles Frost, dated August 22, 1968	1
19	Certificate of Marriage, Charles E. Frost, Jr., Claudia Frost, dated August 14, 1968	1
20	Certification of Birth: James Anthony Frost, Rudella Elizabeth Frost, dated August 6, 1964 and September 23, 1964, respectively	1
21	Certificate of Birth Registration, Charles Edward Frost and, child unknown #7, 1971	1
22	Certificate of Birth Registration, Lala Margaret Cockeys, dated February 14, 1973	2
23	Statement of Clement, dated February 22, 1973	2
24	Letter to Claudia Frost, from Office of the City Clerk, dated February 20, 1973	1
25	Letter from Galloway, dated February 24, 1973	2
26	Report of Contact, Lala Frost (Porter), dated February 19, 1973	2
27	Statement of Galloway, date stamped March 19, 1973	2
28	Statement of Lala C. Porter, dated May 17, 1973	2
29	Letter to Claudia Frost, from Baldwin Fire Department, dated May 11, 1973	1

Claudia Frost

3
C-31-1932

Charles Frost (located)

EXHIBITS

EXHIBIT
12

- 30 Letter from Charles Nichl, dated May 22, 1973 1
31 Letter from Elizabeth Silanesica, dated May 24, 1973 1
32 Letter from Claudia Frost, dated May 29, 1973 1

EXHIBITS RELATING TO MURKIN

- 33 Letter from C. Frost, Jr., to Miss Lola Coolidge,
dated March 9, 1967 2
34 Letter from C. Frost, Jr., to Miss Lola Coolidge,
dated March 3, 1967 3
35 Letter from Charles Frost, Jr., to Miss Lola
Coolidge, dated March 22, 1967 5
36 Letter from Charles Frost, Jr., to Miss Lola
Coolidge, dated March 13, 1967 6
37 Letter from C. Frost, Jr., to Miss Lola Coolidge,
dated April 6, 1967 4

EXHIBITS AFTER MURKIN

- 38 Letter from Lawrence W. Dow, dated December 5, 1973 1
39 Notarized Statement, Thorne G. Sorrell, Probation
Director, Nasco County Probation Department, around
November 20, 1973 1
40 Alphabetic Cross Index Cards 2
41 Letter from Ward Lumber Company, Inc., dated
November 26, 1973 with Record of Account 2
42 Loan Application, National Commercial Bank and Trust
Company, dated January 26, 1966 1
43 ~~Exhibit 43 - Letter from Charles Frost, dated January 26, 1966~~

Claudia Frost

DD-4-1002

Charles Frost (united)

EXHIBITS

EXHIBIT

EXHIBIT

EXHIBIT

43 U. S. Individual Income Tax Return, 1967, Lola M. Collings;
U. S. Individual Income Tax Return, 1968, Lola Collings and
attachments. 9

44 Price acknowledgement, signed by Susie Savitt, Attorney,
12/12/73; Letter from Mrs. Charles Frost, Sr., dated
11/29/73. 2

45 Letter from Banks, dated 12/11/73, with Application for
New Account and Order Blank. 4

46 Report from Champlain Valley Physicians Hospital
Medical Center, 1967, 1968, 1971 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

CLAUDIA FROST, individually and as :
the next friend of JAMES FROST and :
KRISTEN FROST, minors, and as repre- :
sentatives of a class of all persons :
who are now or may in the future be :
entitled to receive survivors' bene- :
fits under the Social Security Act :
whose benefits have been or may be :
reduced without a prior hearing, :
:

73-C-1383

Decision and Order

May 3, 1974

Plaintiffs, :

-against-

C
CASPAR WEINBERGER, as Secretary of the :
United States Department of Health, :
Education and Welfare, :

Defendant. :

- - - - - x

APPEARANCES:

SUSAN SAVITT, ESQ.

NASSAU COUNTY LAW SERVICES COMMITTEE, INCORPORATED

RENE H. REINACH, ESQ.

GREATER UP-STATE LAW PROJECT

MONROE COUNTY LEGAL ASSISTANCE CORPORATION

Attorneys for Plaintiffs

EDWARD JOHN BOYD V., ESQ.

Acting United States Attorney
Eastern District of New York

Attorney for the Defendant

LLOYD H. BAKER, ESQ.

Assistant United States Attorney
Of Counsel

TRAVIA, D. J.

The facts relevant to the legal issues presented to this court are not in dispute. Charles Frost, Jr., the husband of the plaintiff Claudia Frost and the father of the plaintiffs James and Kristen Frost, died on August 21, 1968, and was fully insured under the provisions of the Social Security Act, Title 42 U.S.C. § 414(a). In that same year, the plaintiffs began receiving survivors' benefits under the provisions of the ^{/1} Social Security Act. By 1973 the payments being made under the award amounted to \$159.30 per month for each of the named plaintiffs, i.e., an aggregate monthly benefit of \$477.90 for ^{/2} the entire family.

On February 15, 1973 the plaintiffs were notified by letter that their monthly benefits were to be reduced by \$63.60 per person, or a total reduction of \$190.80 per month for the family. The basis for the downward adjustment in bene-

^{/1} Title 42 U.S.C. §§ 402(b)(1)(B), 402(b)(2), 402(g)(1) and 402(d)(1)-(2).

^{/2} Plaintiff, Claudia Frost, also receives \$121 per month plus food stamps and medicaid as the grantee for her two-year old daughter, Kimberly Frost, who is not eligible for Social Security benefits.

fits was stated to be because the Social Security Administration had determined that the insured decedent, Charles Frost, Jr., had fathered two illegitimate children, Charles E. and Tina L. Frost (hereinafter referred to as the "claimants"), who had also applied for and were now entitled to receive survivors' benefits.^{/3}

Reduction of the plaintiffs' benefits was deemed necessary by virtue of the maximum total benefits limitation provided in ^{/4} Title 42 U.S.C. § 403(a). It is alleged that upon inquiring into the matter plaintiff, Claudia Frost, was orally advised that in order to contest the Social Security Administration's decision, she would have to file a written request for reconsideration and submit evidence which would rebut either claimants' allegations or the administrative determination.^{/5} Plaintiff, Claudia Frost, then filed the

^{/3} The reduction was said to be in compliance with the United States Supreme Court decision in Griffin v. Richardson, 409 U.S. 1069 (1972), which found that it was an invidious form of discrimination to deny illegitimate children, who are otherwise qualified, the right to equally partake in the distribution of Social Security benefits with their legitimate siblings.

^{/4} Since a family maximum is provided for under the Social Security Act and the benefits distributed subsequent to the Griffin decision had to be reapportioned equally among children of the wage earner, regardless of a child's legitimacy, legitimate children who had previously collected the entire benefit would have to suffer a downward adjustment in their benefits to accommodate the newly eligible children.

^{/5} Although it is not clear from the pleadings, it would seem that the "protest" stage of the Social Security Adminis-

requisite forms for reconsideration at the local office of the Social Security Administration in Freeport, New York, on behalf of herself and her children. Plaintiff, Claudia Frost, alleges that she repeatedly requested an opportunity to examine the evidence which had formed the premise for the administrative determination, but that her requests were all denied. She asserts that as a result she was unable to present sufficient evidence to rebut the claimants' assertions and could only categorically deny the claim that her husband had sired the two claimants.

In May 1973 the plaintiffs received a letter of "reconsideration determination," informing them that the Social Security Administration had deemed the original determination, which found the two claimants entitled to benefits under Section 216(h)(3) of the Social Security Act, to have been correct in all respects. Thereafter, commencing with the May 1973 survivors' benefits payment and continuing until the present date, plaintiffs have only received their benefits at the reduced level of payment.

/5 (cont'd)

tration's procedure was by-passed, or what was termed "reconsideration" was in actuality a "protest" under Section T 310 of the Social Security Administration's Claim Manual.

In October 1973, plaintiff, Claudia Frost, commenced the instant action, on behalf of herself, her two infant children, as well as on behalf of all persons similarly situated, against the defendant, who is statutorily charged with the administration of the provisions of the Social Security Act and who is empowered to make rules and regulations and to establish procedures for determining benefit rights under the Act.

Title 42 U.S.C. § 405(a) and (b).

The plaintiffs demand the following relief:

(1) A declaratory judgment that the reduction of benefits to the plaintiffs and the members of the class represented by them prior to a hearing violates their rights to the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(2) A declaratory judgment establishing the minimum standards for any hearing required to be given prior to any reduction of benefits to the plaintiffs and the members of the class represented by them, including but not limited to:

(a) prior notice in writing of the initial determination of the right to request a pre-reduction hearing, of how to obtain such a hearing, of the right to be represented by counsel at such hearing, of the right to confront and

cross-examine witnesses, and of the right to examine documents and records to be used at such hearing at a reasonable time prior to and during such hearing.

(b) The deferral of the effective date of any reduction pending the decision in such hearing.

(3) A mandatory permanent injunction ordering defendant, his successors in office, agents and employees, to establish the mechanism for providing such hearings, for the plaintiffs and the members of the class represented by them.

(4) A permanent injunction prohibiting defendant, his successors in office, agents and employees from reducing benefits to the plaintiffs and the members of the class represented by them without such a prior hearing.

(5) A preliminary injunction prohibiting defendant, his successors in office, agents and employees from reducing benefits to the plaintiffs and the members of the class represented by them without such a prior hearing.

(6) A temporary restraining order requiring that pending a hearing as requested herein defendant restore the benefits of the named plaintiffs to the levels to which they would be entitled but for the reduction herein alleged and a

temporary restraining order, preliminary injunction and/or permanent injunction requiring that defendant restore to the named plaintiffs all sums by which the benefits of the named plaintiffs have been reduced without a hearing.

(7) A determination that this action be maintained as a class action and that the declaratory and injunctive relief ordered apply to all members of the class.

C
On November 2, 1973 the plaintiffs made application to this court for the issuance of a temporary restraining order and a preliminary injunction, directing the defendant to restore plaintiffs' survivors'benefits to the pre-reduction level. This court, by an order signed November 12, 1973, denied the plaintiffs' motion without prejudice to a renewal, if the defendant failed to hold an administrative hearing on the matter within one month. Pursuant to this court's order, a hearing was held on November 27, 1973 by the Social Security Administration, as will be referred to herein.

C
Subsequently, the plaintiffs made a motion, pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure, seeking leave of this court to maintain their lawsuit as a class action. Oral argument on the application was heard on December 8, 1973. On that date, the parties indicated their desire to submit motions for summary judgment. Accordingly,

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the attorneys orally agreed that decision on the class action motion should be held in abeyance pending the resolution of the litigants' respective motions for summary judgment. On February 26, 1974 in addition to filing a motion for summary judgment the plaintiffs also renewed their previous application for a preliminary injunction. Oral argument was heard on all of the unresolved motions on March 8, 1974, at which time it was brought to the court's attention that an administrative determination had been rendered by an Administrative Law Judge on the underlying factual merits of the claimants' eligibility to share in the plaintiffs' benefits. As a result, this court granted the litigants two-weeks to submit additional papers and memoranda, commenting on the impact of the administrative ruling upon the instant action.

MAINTENANCE OF A CLASS ACTION

Rule 23 of the Federal Rules of Civil Procedure provides the applicable standards for determining whether a suit can be maintained as a class action. As a prerequisite to the declaration of any lawsuit as a class action, a plaintiff must demonstrate that:

"(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).

The spirit of Rule 23 calls for a liberal rather than a restrictive reading of the statutory language. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968). Indeed, it has been opined that "if there is to be an error made, let it be in favor and not against the maintenance of the class action." Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir.), cert. denied, 395 U.S. 977 (1968).

The defendant's opposition to the plaintiffs' right to maintain this lawsuit as a class action is grounded upon the plaintiffs' alleged failure to comply with the "typicality" requirement of Rule 23(a)(3). More specifically, the defendant asserts that by the very nature of the case, the interests of approximately one-half of the members, i.e., the illegitimate children, are diametrically opposed to the interests of the plaintiffs, who purport to represent the class. In support of this contention, the defendant cites the rule that:

"[I]f the class members themselves have conflicting rights in the subject matter of the litigation so that their respective priorities among the class members must be determined in the action, then claims of a right to represent the class often will be found to be improper." 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1768, at 647.

Upon closer scrutiny, however, the defendant's argument must be rejected. The rule defendant relies upon is subject to one important caveat, namely, that the antagonism among the class members "must be as to the subject matter of the suit." 3B MOORE, FEDERAL PRACTICE § 23.07 [3], at 23-104. Any antagonism of interests which might exist here relates solely to the ultimate apportionment of the survivors' benefits between the claimants and the plaintiffs. ^{/6} This is an issue not properly before this court and it is wholly peripheral to the central issue which is presented in this case, i.e., whether a recipient of survivors' benefits is entitled to a pre-reduction evidentiary hearing. Inasmuch as both the plaintiffs and the claimants would stand to benefit from a requirement that the Social Security Administration provide a due process hearing prior to any downward adjustment in a recipient's benefits, this court is unable to discern any conflict of interests between the claimants and the plaintiffs. By supposition, if at a future time the Social Security Administration were to determine that other children were also the progeny of the deceased insured, then the claimants herein

^{/6} Even this purported antagonism has been obviated by the Administrative Law Judge's ruling that the claimants are in fact the children of the wage earner.

would have an interest coextensive with that of the plaintiffs in demanding that an evidentiary hearing be afforded to them before any readjustment in benefits takes place.

Moreover, it is arguable that the claimants are really not in fact members of the class which the plaintiffs seek to represent. Plaintiffs only purport to represent those recipients of survivors' benefits who have had a downward adjustment in benefits without being afforded a pre-reduction evidentiary hearing. The claimants clearly have not suffered such a deprivation and cannot be considered as coming within the parameters of the class.

As to the other prerequisites enumerated in Rule 23 (a), suffice it to say that the plaintiffs have adequately demonstrated the requisite numerosity, that a common question of law exists^{/7} and that they, as representatives, will fairly and adequately protect the interests of their fellow class members. Similarly, the plaintiffs' case falls squarely under Rule 23(b) (2):

"the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole."

^{/7} See Escalera v. New York City Housing Auth., 425 F.2d 853, (2d Cir.), cert. denied, 400 U.S. 853 (1970).

See 3B J. MOORE, FEDERAL PRACTICE § 23.40, at 23-653 n.19
 (Supplement 1972).

MOOTNESS AND STANDING

The defendant strenuously maintains that because the Social Security Administration has granted the plaintiffs an evidentiary hearing on the merits of their underlying claim, their case has now been rendered moot. This court disagrees.

^{/8} It has long been held in this circuit, ^{/9} as well as elsewhere, that the mootness of an individual plaintiff's claim will not necessarily render the class action moot. Rather, the touchstone for determining mootness is the likelihood that the behavior complained of will not recur. ^{/10} When the question of mootness arises, the burden shifts to the defendant to "demon-

^{/8} See, e.g., Steinberg v. Fusari, 364 F.Supp. 922, 928 (D.Conn. 1973); Torres v. New York State Dep't of Labor, 318 F.Supp. 1313 (S.D.N.Y. 1970); Kelly v. Wiman, 297 F.Supp. 887 (S.D.N.Y. 1968), aff'd sub nom. Goldberg v. Helms, 397 U.S. 254 (1970); Gatling v. Butler, 52 F.R.D. 389 (D.Conn. 1971).

^{/9} See, e.g., Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Cypress v. Newport News General & Nonsect. Hosp. Ass'n, 375 F.2d 648, 657-658 (4th Cir. 1967); Kuebler v. Butz, 358 F.Supp. 228 (N.D.Cal. 1973); Thomas v. Clark, 54 F.R.D. 245, 252 (D.Minn. 1971); Crow v. California Dept. of Human Resources Development, 325 F.Supp. 1314 (N.D.Cal. 1970); Vaughan v. Power, 313 F.Supp. 37, 40 (D.Ariz.), aff'd 400 U.S. 834 (1970).

^{/10} Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911); see Johnson v. New York State Ed. Dep't, 409 U.S. 75, 76 (1972) (Marshall, J., concurring); Moore v. Ogilvie, 394 U.S. 814, 816

strate that there is no reasonable expectation that the wrong will be repeated." United States v. W.P. Grant Co., 345 U.S. 629, 633 (1953); Torres v. New York State Dep't of Labor, supra, 318 F.Supp. at 1316.

With this criterion in mind, compelling reasons exist for the conclusion that the present class action should not be dismissed on the ground of mootness. The defendant, rather than showing that other recipients of survivors' benefits will be accorded different treatment in futuro, has steadfastly clung to the correctness of his position that the administrative procedures currently in force are in total compliance with the requirements of due process. There are numerous recipients who are members of the class who have already had their award of benefits reduced without a hearing or who are still subject to the same administrative treatment. Certainly, as to these recipients the action remains a viable one. See Johnson v. New York State Ed. Dep't, supra, 409 U.S. at 76 (1972) (Marshall, J., concurring). If the rule were otherwise, a defendant might easily circumvent the judicial resolution of an important constitutional issue simply by settling the individual case of the representative plaintiff. Fortunately, the courts will not permit a defendant to use the doctrine of mootness as a vehicle to evade the resolution of

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key constitutional questions. Davis v. Caldwell, 53 F.R.D. 373, 376 (N.D.Ga. 1971); Torres v. New York State Dep't of Labor, supra, 318 F.Supp. at 1317-1318; Kelly v. Wyman, 294 F. Supp. 887 (S.D.N.Y. 1968), aff'd sum non. Goldberg v. Kelly, 397 U.S. 254 (1970).

Similarly, it is not a valid argument to claim that because the plaintiffs have received a post-reduction hearing, they are no longer members or proper representatives of the class. From its inception, this lawsuit has been denominated as a class action, and there is a presumption that class action status exists despite the fact that no formal declaration to that effect has been made by this court. See 3B J.MOORE, FEDERAL PRACTICE ¶ 23.50, at 23-1103; Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969); see also C.A. Wright, Class Actions, 47 F.R.D. 169, 182 (1970). Since the plaintiffs were proper members of the purported class at the commencement of this action, any subsequent mootting of their individual claims will not affect their right or ability to continue litigating the case on behalf of the class. See, e.g., Thomas v. Clarke, 54 F.R.D. 245, 252 (D.Minn. 1971); Gatling v. Butler, supra, 52 F.R.D. at 395.

The case of Torres v. New York State Dep't of Labor, supra, is in point and would seem to be dispositive. In that

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case the same argument of mootness was raised and the court found it to be unpersuasive for a number of reasons. Firstly, the representative plaintiff therein, as here, was never afforded the type of hearing which the class had demanded; instead of a pre-termination hearing, plaintiff was given a post-termination hearing. Thus, the court concluded that:

"In a sense, Torres' status as of the time he brought this action could never be changed and could lead neither to mootness nor to his being unrepresentative. Giving Torres a hearing following the termination of his benefits cannot alter the fact that he was declared ineligible and deprived of . . . benefits before he was given a hearing. Thus, his status as a representative of others who are subjected to a pre-hearing termination has not changed." 318 F.Supp. at 1317.

Secondly, the court in Torres found that there has been a long standing judicial policy of not permitting technical rules of representation to bar the adjudication of substantial questions of constitutional law. Id., citing Smith v. Board of Ed., 365 F.2d 770, 776 (8th Cir. 1966) and Kelly v. Wyman, supra, 294 F.Supp. at 890.

Defendant cites a number of judicial decisions to support his claim that the present action has been mooted. Most of the opinions relied upon by the defendant are clearly not applicable to the facts of the present case; many of these cases either deal with a representative plaintiff who
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had not been a proper member of the class at the initiation

of the lawsuit or the actions themselves were not brought as
/11 class actions.

JURISDICTION

Before turning to the constitutional claim raised by the plaintiffs, it would seem appropriate at this juncture to comment briefly upon this court's jurisdiction to entertain the present action.. This court possesses the requisite jurisdiction to hear and determine all of the issues presented in this case under the multiple jurisdictional predicates of

/11 Worthy of discussion is Lindsay v. Richardson, 357 F.Supp. 203 (W.D.N.C. 1973), wherein the court dismissed a class action for the recoupment of Social Security benefits. Defendant has, however, misconstrued Lindsay as standing for the proposition that a class action, contesting the constitutionality of reduction procedures, is rendered moot when the representative plaintiff receives a subsequent administrative hearing. Actually, the court deemed the action moot because of the intervening adoption by the Social Security Administration of new regulations during the pendency of the lawsuit. The court assumed that these new regulations would be compatible with the requirements of due process and that the class action was no longer viable "because its purpose [had] now [been] accomplished." Id. at 205. Moreover, the reliability of the Lindsay opinion is questionable in light of the fact that the court failed to cite any judicial precedent which would be supportive of its conclusion.

Title 28 U.S.C. §§ 1331,^{/12} 1361^{/13} and Title 5 U.S.C. § 701
/14
et seq.

The defendant contests the court's jurisdiction to entertain this action because of the plaintiffs' alleged failure to exhaust their administrative remedies. Such an argument is fundamentally without merit. Although the general rule requires the exhaustion of administrative remedies before the initiation of an action in the federal courts, see Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), the courts have carved out two major exceptions to this rule: (1) when the administrative remedy is wholly inadequate and a federal question is plainly presented or (2) where the delay in attempting to exhaust administrative remedies would be prejudicial and cause irreparable injury. Martinez v. Richardson, 472 F.2d 1121, 1125; see Smith v. Illinois Bell

^{/12} See Cortright v. Resor, 325 F.Supp. 797, 809 (E.D.N.Y. 1971), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971).

^{/13} See Elliot v. Weinberger, Docket No. 72-3629 at 10-12 (D.Haw. Feb. 4, 1974); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973); Mead v. Parker, 464 F.2d 1103 (9th Cir. 1972).

^{/14} Mills v. Richardson, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972); Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Bass v. Richardson, 338 F.Supp. 478, 482 (S.D.N.Y. 1971).

Tel. Co., 270 U.S. 587, 591-592 (1926); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 COL. L. REV. 1404, 1438-1440 (1972). The instant action falls within the first exception. Since an Administrative Law Judge is precluded from passing upon the constitutionality of the very procedures he is called upon to administer, the administrative procedures are totally inadequate to resolve the plaintiffs' constitutional challenge. See, e.g., Morris v. Richardson, 346 F.Supp. 494 (N.D.Ga. 1972); Gainville v. Richardson, 319 F.Supp. 16 (D.Mass. 1970). It would be an effort in futility to require the plaintiffs to exhaust the very administrative procedures which they now seek to overturn. See, e.g., Jeffries v. Swank, 337 F.Supp. 1062, 1066 (N.D. Ill. 1971); cf. Boone v. Wyman, 295 F.Supp. 1143, 1151 (S.D.N.Y.), aff'd 412 F.2d 857 (2d Cir. 1969), cert denied, 396 U.S. 1024 (1970).

The plaintiffs have already received an administrative hearing by the Social Security Administration and any administrative appellate review would be limited to only the factual determinations made by the Administrative Law Judge.

/15 It was the Administrative Law Judge's finding that Charles E. and Tina L. Frost were in fact children of the decedent wage earner within the meaning of Section 216(h)(3) of the Social Security Act.

Thus, nothing would be accomplished by forcing the plaintiffs to pursue and exhaust their administrative remedies prior to the maintenance of this action, since the constitutional issue sought to be litigated herein would still remain unrescived.

THE CONSTITUTIONAL CLAIM

The primary issue which is sought to be adjudicated herein is whether the Social Security Administration can constitutionally make a downward adjustment, albeit for a legitimate and philoprogenitive purpose, in the amount being paid under an existing award of survivors' benefits without affording the adversely affected recipient an opportunity to contest the reduction at a pre-reduction evidentiary hearing. The plaintiffs contend that the administrative procedures currently being employed by the Social Security Administration are generally violative of the Due Process Clause of the Fifth Amendment and are, more particularly, not in compliance with the Supreme Court's mandate in Goldberg v. Kelly, 397 U.S. 254 (1970).

As previously noted, the downward adjustment of the plaintiffs' survivors' benefits arose as a consequence of the Supreme Court's decision in Richardson v. Griffin, 409 U.S. 1069 (1972), affirming 346 F.Supp. 1226 (D.Md. 1972), which re-

moved the arbitrary distinction that had previously been drawn between legitimate and illegitimate children with respect to eligibility for Social Security benefits. Although a reapportionment of existing awards is necessary in certain instances to effectuate the dictates of the Richardson /16 decision, the Court laid down no explicit guidelines for administrative authorities to follow in properly implementing its holding. The Richardson opinion should not be interpreted as a carte blanche grant of authority to the Social Security Administration to carry out the necessary redistribution of benefits in a manner which would contravene the requirements of procedural due process. It can safely be assumed that it was not the Supreme Court's intent to correct one existing deprivation and in the process create yet another egregious inequity by encroaching upon the procedural due process rights of other individuals. Therefore, the Richardson decision cannot be used as a remedial cure or a means to legitimize a denial of due process rights.

Initially it should be observed that once entitlement

/16 The downward adjustment of benefits is only necessary where the existing beneficiaries are receiving the family maximum prior to the time of readjustment. See note 4 supra.

to survivors' benefits has been found to have vested in an individual, his interest in the continuation of such benefits is not merely a "privilege," but is a matter of statutory "right." See Anderson v. Richardson, 454 F.2d 596, 599 (6th Cir. 1972); cf. Goldberg v. Kelly, supra, 397 U.S. at 262. Although this "right" is far from absolute, it can only be disturbed through an adjudicatory process which comports with minimal standards of procedural due process.

Concededly, due process is not an inflexible rubric and the procedural protections demanded by it will vary according to the factual circumstances of a particular case and the nature of the right sought to be adjudicated. See Goldberg v. Kelly, supra, 397 U.S. at 262-263. It is well established, however, that where "important rights" are at stake, due process at a minimum requires an opportunity to be heard, Grannis v. Ordean, 234 U.S. 385, 394 (1914), "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In attempting to ascertain whether the administrative procedures challenged herein are in fact constitutionally infirm, this court should use as a basis of comparison the landmark decision in Goldberg v. Kelly, supra, to gain instructive insight. In Goldberg, the Supreme Court held, inter alia, that

a welfare recipient's right to the continuation of public assistance could not be cut off without affording him an opportunity to contest the deprivation at a pre-termination evidentiary hearing. The Court determined that only a pre-termination evidentiary hearing would satisfy the requisites of procedural due process in the context of welfare benefits. 397 U.S. at 264. In reaching this result the Court noted that the sole purpose for requiring a pre-termination, in contradistinction to a post-termination, hearing was to:

"produce an initial determination of the validity of the . . . department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." 397 U.S. at 267.

This same purpose was reiterated in Fuentes v. Shevin, 407 U.S. 67 (1972), wherein the Court also articulated the underlying rationale for making a prior hearing obligatory:

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' " Id. at 81-82. (Citations omitted).

By its very nature, post-deprivation adjudication is substantially ineffectual and constitutionally deficient. Its fatal shortcoming springs from its remedial, rather than preventative, character. Its procedural machinery can only be set into motion after the act of deprivation has taken place. Thus, it fails to provide the recipient with adequate protection at the critical moment when deprivation occurs.

The inadequacy of post-deprivation adjudication to safeguard the rights of a recipient assumes an even more dangerous dimension when the recipient is destitute and, therefore, totally or in great part dependent upon his benefits to maintain his existence. To the indigent recipient even a partial or temporary deprivation of benefits can be financially disastrous. Inasmuch as the aggrieved recipient's economic plight becomes acutely desperate, he can gain little succor from the knowledge that he might ultimately recoup the amounts which are being erroneously withheld.

The boundaries of due process protection are always coextensive with the gravity of the interest sought to be adjudicated and "the extent to which [the recipient] is condemned to suffer grievous loss." 397 U.S. at 262-263. Thus, the Court in Goldberg gave considerable weight to the "bru-

tal need" of the welfare recipient in determining whether a full evidentiary hearing should be required.^{/17}

"Thus, the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." 397 U.S. at 264. (Footnotes omitted)

In this court's opinion, the impact of withholding benefits is no less debilitating to the recipient of survivors' benefits. The avowed purpose for enacting survivors' benefits legislation was to protect the dependents of insureds who had been deprived of the means of support by the death of a wage earner. Thus, Congress recognized a "brutal need" on the part of these dependents and sought to ameliorate their financial predicament through remedial legislation. The recipient's reliance upon his payments is also substantiated by a recent Social Security Administration study, which reported that two-thirds of all beneficiaries receiving survivors' benefits depend upon their monthly payments as "the major source of income." E. Palmore, G. Stanley & R. Cormier, Widows with Children under Social Security 15 (1966). Illustrative of the recipient's

^{/17} In Goldberg, the Court employed a "balancing test" to determine the due process requirements in the context of welfare benefit

"brutal need" is the precarious financial situation of the representative plaintiffs herein. The administrative cut of forty percent has lowered the plaintiffs' annual benefits award to \$3,445.20, an amount only marginally above the level set in 1971 as the "average poverty threshold for nonfarm families." See Social Security Bulletin, Annual Statistical Supplement 1971, Table 7 at 31. It is because of this reduction that the plaintiffs now complain that they are unable to purchase the necessities of life and that their debts are rapidly accumulating.

The mere fact that entitlement to welfare benefits is predicated upon a "need" basis and eligibility for survivors' benefits is not, does not mean that the recipients of the latter are not, in fact, financially in need. Moreover, the Court in Goldberg spoke in broad terms of economic need and its holding should not be narrowly confined to only those situations where need is a prerequisite to eligibility. See Anderson v. Richardson, supra, 454 F.2d at 600; see also Wieners v. Shevin, supra at 88-90; Pregent v. New Hampshire Dep't of Employment Sec., 361 F.Supp. 782, 791 (D.N.H. 1973); Eldridge v. Weinberger, 361 F.Supp. 520, 523-524 (W.D.Va. 1973).

Even assuming arguendo that the requisite "brutal

/17 The Court weighed the interest of the Government in summary adjudication against the countervailing interest of the recipient in retaining his benefits.

"need" is not present here, judicial opinions subsequent to Goldberg have dispelled any thought that only "necessary property" comes within the purview of procedural due process protection. See, e.g., Fuentes v. Shevin, supra, 407 U.S. at 82-90. With the "brutal need" test finally laid to rest, the only proper criterion for determining whether a prior hearing is indispensable in a given context, rests upon a consideration of whether the interest sought to be adjudicated is deemed to be "important," as distinguished from "de minimus." See, e.g., Bell v. Burson, supra, 402 U.S. 535, 539 (1971). The interest present in question clearly falls within the former category. The right to the continuation of survivors' benefits reaches at least the same level of significance as other interests which have been declared to be "important" under judicial standards. See, e.g., Fuentes v. Shevin, supra; Bell v. Burson, supra. Once an interest can be categorized as "important," pre-deprivation adjudication is always required. The form that the pre-deprivation hearing is to assume, however, will fluctuate according to level of importance or relative weight of the interest involved. See Fuentes v. Shevin, supra, 407 U.S. at 82. It is only in determining the form of the hearing that the "brutal need" of a recipient becomes germane. Id.

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Undoubtedly, there are occasions when a hearing may

legitimately be held after the act of deprivation has taken place. See, Goldberg v. Kelly, supra, 397 U.S. at 264. These instances, however, have been judicially limited to only a few unusual or "extraordinary situations," see Fuentes v. Shevin, supra, 407 U.S. at 90-91, where the Government's concern for summary adjudication will override the individual's interest in retaining the property. Defendant argues that to require the Social Security Administration to provide a pre-reduction evidentiary hearing in cases such as this would create an unwarranted burden upon the public fisc and upon administrative resources. But this argument has already been rejected by the Supreme Court in both Goldberg and Fuentes.

"A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.

. . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of a person whose possessions are about to be taken." Fuentes v. Shevin, supra, 407 U.S. at 90 n. 22. (Citations omitted).

See also City of New York v. Richardson, 473 F.2d 923, 932 (2d Cir. 1973); Eldridge v. Weinberger, supra, at 527.

It is also the defendant's contention that the presently existing procedures used by the Social Security Ad-

ministration in making downward adjustments in survivors' benefits are more than adequate to satisfy the demands of procedural due process. More specifically, the defendant maintains that the existing procedures afford a recipient with an opportunity to rebut the administrative determination at a meaningful time before the reduction becomes operative. Under Section T 312 of the Social Security Administration's Claims Manual, a recipient is permitted to file a written "protest" within a forty-five day period following notification of the Social Security Administration's intent to make a downward adjustment in benefits. If a "protest" is submitted within that period and prior to the adjustment date and the protest is accompanied by sufficient documentary evidence to cast doubt on the initial administrative determination, then reduction of benefits will be postponed. Although this procedure provides a form of "paper" hearing prior to any act of governmental deprivation, it still falls short of the constitutional standards demanded by procedural due process.
^{/18}

^{/18} Since the focus of the plaintiffs' constitutional challenge centers upon the Social Security Administration's failure to provide constitutionally adequate pre-reduction procedures, this court need not delve into secondary considerations of whether the post-reduction administrative procedures satisfy due process requirements. It is not enough that the Social Security Administration's post-reduction

Admittedly, "due process tolerates variances in the form of a hearing 'appropriate to the nature of the case' . . . and depending upon the importance of the interests involved.'" Fuentes v. Shevin, supra, 407 U.S. at 83, quoting Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950) and Boddie v. Connecticut, 401 U.S. 371, 378 (1971). But it is beyond cavil that whenever the pivotal factor in deciding a case turns upon a question of fact, procedural due process requires an opportunity to confront and cross-examine adverse witnesses at a time prior to actual deprivation. See Goldberg v. Kelly, supra, 397 U.S. at 269.

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have

7/18 procedures are valid under due process. The critical time when procedural protection is most sorely needed occurs prior to and not after the act of deprivation.

ancient roots. * * * This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny."¹⁹ Id. at 270, quoting Greene v. McElroy, 360 U.S. 474, 496-497 (1950).

One case decided by the Second Circuit has gone so far as to limit the Goldberg doctrine's applicability to only situations where a factual determination is involved. Mills v. Richardson,
^{/19} 464 F.2d 995, 1001 (2d Cir. 1972).

In deciding whether the claimants are entitled to share equally in the distribution of survivors' benefits with their legitimate siblings, the Social Security Administration must first, perforce, determine whether the claimants are in fact the off-springs of the deceased insured. This is a factual question which should only be resolved after a pre-reduction evidentiary hearing where the plaintiffs are given a full opportunity to rebut the claimants' evidence and im-

^{/19} The defendant's reliance upon Mills v. Richardson, 464 F.2d 995 (2d Cir. 1972), for the holding that a hearing is not necessarily required before the termination or reduction of benefits, would seem to be misplaced. Mills dealt with the constitutionality of procedures used in the recoupment of overpayments, and unlike the case at bar, it did not involve any factual determinations.

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peach the latters' credibility.^{/20} Without the opportunity to confront and cross-examine witnesses the decision maker is deprived of the ability to render an informed opinion based upon the total evidence in a case and the credibility of the various witnesses. More importantly, the recipient is denied an "opportunity to be heard in a meaningful manner."

Under the present procedures, the Social Security administration is permitted to make an initial ex parte determination of a factual issue even before any notification is sent to the recipient.

"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... [A]nd no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Fuentes v. Shevin, supra, 407 U.S. at 81, quoting Joint Anti-Fascists Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring).

/20 It is of little consequence that the Administrative Law Judge ultimately held against the plaintiffs after a full post-reduction evidentiary hearing on the underlying merits of the case.

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the [Fifth] Amendment that a significant property interest is at stake, whatever the ultimate outcome of the hearing...." Fuentes v. Shevin, 407 U.S. at 87.

Although the aggrieved recipient is allowed to "protest" the administrative determination, his avenue of redress is severely constricted to the filing of written submissions. At best, the "protest" stage of the administrative process closely approximates the procedures which were specifically disapproved of by the Court in Goldberg.

"The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront and cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

.... Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 268-269.

The "protest" stage, which is the only procedural safeguard afforded a recipient prior to the readjustment of benefits, does not rise to the level of a prior hearing and, consequently, the procedure is constitutionally deficient because it does not enable the recipient to test the factual or legal

dentiary hearing.

The hearing contemplated by Goldberg does not require all the procedural paraphernalia that is demanded in a full-blown judicial or quasi-judicial trial, but it does prescribe that certain safeguards must be extended to the recipient, including:

(1) a pre-reduction hearing, wherein the recipient is permitted to present oral argument;

(2) the right to confront and cross-examine adverse witnesses;

(3) the opportunity to retain and be represented by counsel; and

(4) an impartial decision maker who will render a comprehensive opinion on the matter in controversy.

Since its pronouncement, the courts have refrained from giving a "narrow reading" to the Goldberg doctrine, see Fuentes v. Shevin, supra, 407 U.S. at 88, and have liberally applied its tenets to a broad spectrum of areas. The ap-

^{7/21} Perry v. Sindermann, 408 U.S. 593 (1972) [rights of a tenured teacher]; Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972) [replevin of consumer goods]; Bell v. Burson, 402 U.S. 535, 539 (1971) [suspension of an automobile and operator's license]; Wheeler v. Montgomery, 397 U.S. 262 (1970) [suspension of old age benefits]; Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973) [garageman's lien]; Elliott v. Weinberger, supra [overpayments of Social Security payments]; Eldridge v. Weinberger, 361 F.Supp. 520 (W.D.Va. 1973) [disability benefits]; Hunt v. Edmunds, 328 F.Supp. 468 (D.Minn. 1971).

plication of the Goldberg doctrine to the instant case seems unavoidable. This court cannot perceive of any significant reason why beneficiaries of survivors' benefits should not be entitled to the same constitutional protections that are currently being enjoyed by welfare recipients. The mere fact that the present action deals with an administrative reduction of benefits, while Goldberg involved an outright termination of benefits, is not a solid ground for distinguishing the two cases. Qualitatively, the deprivation in the instant case is just as compelling in a constitutional sense as it was in Goldberg. Once governmental deprivation of a significant interest is shown, the quantum of deprivation becomes immaterial. As a very recent federal court has aptly indicated:

"Starvation may be slower if benefits are reduced or suspended rather than terminated as in Goldberg, but some recipients will suffer nonetheless." Elliott v. Weinberger, supra, at 15.

See Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972); Hunt v. Edmunds, 328 F.Supp. 469, 475 (D.Minn. 1971).

In reaching this conclusion, this court is not unmindful of the decision in Torres v. New York State Dep't of Labor, 321 F.Supp. 432 (S.D.N.Y. 1971) (2-1 decision), vacated and remanded, 402 U.S. 968, 333 F.Supp. 341 (S.D.N.Y. 1971) (2-1 decision), aff'd, 405 U.S. 949 (1972). In Torres, the

Supreme Court affirmed without opinion the holding of a three-judge court, which had refused to extend the Goldberg doctrine to cover the procedures for terminating unemployment compensation in New York State. The court's decision is, however, inappropriate to the facts of the present action for a number of reasons. Firstly, the plaintiff's unemployment compensation was only terminated after he had received a hearing which was identical to the hearing that had been used initially to determine his eligibility for unemployment compensation. Thus, the plaintiff, in effect, received a pre-termination hearing. Secondly, the court's opinion was rendered prior to the Supreme Court's holding in Fuentes, and it reflected a restrictive approach in the application of the Goldberg doctrine to other areas. It was the court's belief that the Goldberg formula should only be invoked where a "brutal need" was presented. As noted before, this narrow reading of Goldberg has been explicitly discarded by subsequent decisions of the Supreme Court. See Fuentes v. Shevin, supra; Bell v. Burson, supra; see also Steinberg v. Fusari, supra; Pregent v. New Hampshire Dep't of Employment Sec., supra.

THE MOTION FOR INJUNCTIVE RELIEF

Although this court is disposed in favor of granting the plaintiffs' motion for summary judgment, requiring the

Social Security Administration to provide an evidentiary hearing before it can reduce survivors' benefits, it does not necessarily follow that the representative plaintiffs herein are also entitled to injunctive relief. The individual plaintiffs have been given a due process hearing by the Social Security Administration and have argued the underlying merits of their case, i.e., whether the claimants are in fact the progeny of the insured wage earner. Therefore, the need for injunctive relief is obviated by the fact that nothing remains left for the individual plaintiffs to adjudicate. Although other members of the plaintiffs' class still have a viable claim for injunctive relief, the representative plaintiffs no longer have a personal stake in the outcome of the decision rendered by this court. By necessity, the plaintiffs' application for injunctive relief must be denied.

Accordingly, it is

ORDERED that the plaintiffs' motion for the declaration of this lawsuit to be a class action be and the same is hereby granted; and it is further

ORDERED that the plaintiffs' application for injunctive relief, both permanent and temporary, be and the same is hereby denied, and it is further

144 ORDERED that the defendant's motion for summary judgment

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dismissing the plaintiffs' complaint be and the same is hereby denied; and it is further

ORDERED that the plaintiffs' motion for summary judgment declaring the existing procedures of the Social Security Administration to be violative of procedural due process in their failure to afford recipients of survivors' benefits with a pre-reduction oral evidentiary hearing be and the same is hereby granted; and it is further

ORDERED that the defendant adopt new procedures which conform to the dictates of the judgment herein as soon as practically convenient.

Submit order in accordance with the terms of this decision and order.

s/ Anthony J. Travis
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

CLAUDIA FROST, individually and as :
the next friend of JAMES FROST and :
KRISTEN FROST, minors, and as repre- :
sentatives of a class of all persons :
who are now or may in the future be :
entitled to receive survivors' ben- :
fits under the Social Security Act :
whose benefits have been or may be :
reduced without a prior hearing, :
: 73-c-1383

Plaintiffs, : ORDER
- against - : and
: JUDGMENT * /

CASPAR WEINBERGER, as Secretary of :
the United States Department of :
Health, Education and Welfare, :
:

Defendant. :

----- x

This cause came on to be heard on plaintiffs' original motion for a Temporary Restraining Order and Preliminary Injunction directing the defendant to restore plaintiffs' survivors benefits; and the court denying said motion without prejudice to renewal and having ordered same to be restored to the motion calendar if the defendant did not hold a hearing within one month, and an Administrative hearing having been held November 27, 1973, the plaintiffs then moved pursuant to Rule 23 (b) (2) of Federal Rules of Civil Procedure seeking leave to maintain

* / Retyped by appellant because of poor copy.

their lawsuit as a class action, and all parties agreeing in open court to hold the decision on the class action in abeyance pending the resolution of cross motions for summary judgment subsequently filed, and the plaintiffs renewing their previous application for a preliminary injunction, and upon the hearing of all unresolved motions, and the Court having given the matter due deliberation;

Upon the pleadings, affidavits memoranda and briefs submitted to date, the order dated November 12, 1973, the testimony taken in open court and the Order and Decision of the Court dated May 3, 1974, this Court having found in said decision that plaintiffs' case falls under Rule 23 (b) (2) of the Federal Rules of Civil Procedure, and that the issues of this case fall under the jurisdictional predicates of Title 28 USC ¶ 1331, 1331 and Title 5 USC ¶ 701 etseq., and the court declaring the existing Procedures of the Social Security Administration to be violative of procedural due process in failing to afford recipients of survivors' benefits with a pre-reduction oral evidentiary hearing, it is

ORDERED, ADJUDGED AND AGREED that plaintiffs' motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for the declaration of this lawsuit to be a class action be and the same is hereby granted and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs' application for injunctive relief, both permanent and temporary, be and the same is hereby denied, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendants' motion for summary judgment dismissing the plaintiffs' complaint be and the same is hereby denied; and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiffs' motion for summary judgment declaring the existing procedures of the Social Security Administration to be violative of procedural due process in their failure to afford recipients of survivors' benefits with a pre-reduction oral evidentiary hearing be and the same is hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant adopt new procedures which conform to the dictates of the judgment herein as soon as practically convenient.

E N T E R

Judge, U.S.D.C.

Dated: Brooklyn, New York
May 28, 1974

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
125 Cadman Plaza East, Brooklyn, NY 11201

NOTICE OF MOTION

Plaintiff,
-and-counsel-

Civil Action
No. 73 C 1203

CHARLES WILFINGER, As Secretary of
The United States Department of
Health, Education and Welfare,

Defendant.

PLEAD AND NOTICE THAT UPON THE DECISION AND OPINION OF
THE UNITED STATES SUPREME COURT IN *BROWN V. CARLISLE AND SIEGELIN*,
No. 73-203, 42 U.S. 4904, THE UNDERSIGNED WILL MOVE THIS COURT AT
225 CADMAN PLAZA EAST, BROOKLYN, NEW YORK, COURTROOM NO. 9, ON
JUNE 28, 1974, AT 10:00 O'CLOCK IN THE FORENOON OF THAT DAY, OR
AS SOON THEREAFTER AS COUNSEL MAY BE HEARD FOR AN ORDER TO ABATE
THE JUDGMENT HEREIN, PURSUANT TO RULE 59, SO AS TO DENY CLASS
ACTION STATUS TO THIS CASE AND TO THEREUPON DISMISS THE COMPLAINT
AS MOOT, AND FOR SUCH OTHER AND FURTHER RELIEF AS TO THE COURT MAY
DEEM JUST AND PROPER IN THE PREMISES.

Dated: Brooklyn, New York
June 18, 1974

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

by:

J. Michael Polk
JAMES M. POLK
Assistant U.S. Attorney

TO:
Susan Favitt, Esq.
Human Law Services Committee, Inc.
115 North Main Street
Freeport, New York 11520

Patricia M. Prichard, Esq.
Greater Erie-Senate Law Project
Monroe County Legal Assistance Corp.
20 Courtland Street
Rochester, New York 14604

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA FROST, et al.,
Plaintiffs,
-vs-
CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare,
Defendant.

AFFIDAVIT IN OPPOSITION TO
DEFENDANT'S MOTION TO
AMEND JUDGMENT
Civil Action No. 73C 1383

STATE OF NEW YORK) SS:
COUNTY OF MONROE)

RENE H. REIXACH, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and one of the attorneys for the plaintiffs herein. I make this affidavit in opposition to the defendant's motion to amend the judgment in this action.

2. The defendant served his motion to amend the judgment on June 13, 1974, sixteen (16) days after the judgment was entered by the Clerk of this Court on May 28, 1974. Such a delay is plainly contrary to Rule 59(e) of the Federal Rules of Civil Procedure, which requires that such a motion "shall be served not later than 10 days after entry of the judgment."

3. The defendant's contention that this time limit should be ignored because plaintiffs' counsel did not serve a notice of entry of the judgment on the defendant's attorney likewise ignores the plain language of the Federal Rules of Civil Procedure, Rule 77(a) thereof, which provides in relevant part,

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry . . .

The responsibility for such notice lies not with plaintiffs' counsel, but with the Clerk of this Court.

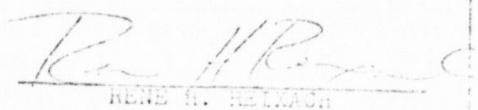
4. Furthermore, the defendant likewise ignores the effect of Rule 6(b) of the Federal Rules of Civil Procedure, governing the enlargement of time by the court in its discretion for good cause shown. Rule 6(b) expressly prohibits the court from extending the time for taking any action under Rule 59(e).

5. Finally the facts show that the defendant's attorney received all the notice to which any litigant is entitled. On June 17, 1974 I called the office of the Clerk of this Court and was informed by David Miller that the docket entry in this action on May 28, 1974 shows the entry of judgment herein and further states "(postcards mailed to attorneys)." The Court is respectfully referred to its records in this action on this point. Under Rule 77(d) of the Federal Rules of Civil Procedure "such mailing is sufficient notice for all purposes for which notice of the entry of an order is required." It would be strange if the defendant's counsel, whose office is located in the same building as the office of the Clerk of this Court received no notice, my office received a notice of the entry of the judgment herein on May 30, 1974 (See Exhibit "A" annexed).

and I am informed by Susan Savitt, Esq., another attorney for the plaintiffs, that her office also received such notice from the Clerk. Indeed, Ms. Savitt informs me that at the time the proposed judgment was forwarded to this Court on May 20, 1974, a copy was also sent to Mr. Baker, counsel for the defendant, and that the original of the judgment contains an affidavit of service of a copy of the judgment with notice of settlement sent to defendant's counsel. The Court is respectfully referred to the original judgment in the Court's files in this regard. Finally, notice of the signing of the judgment in this action was printed in accordance with custom in the New York Law Journal on May 29, 1974, on page 21 (See Exhibit "B" annexed).

6. It is crystal clear that the defendant's attorney received all the notice to which he was entitled. It is now too late for him to move to amend the judgment under Rule 59(e).

WHEREFORE, deponent prays that the defendant's motion to amend the judgment herein be denied.


RENE H. REITMAN

Sworn to before me this

21st day of June 1974.

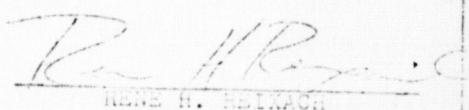


E. WADE EATON
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commissioned April, one thousand nine hundred and seventy-four

and I am informed by Susan Savitt, Esq., another attorney for the plaintiffs, that her office also received such notice from the Clerk. Indeed, Ms. Savitt informs me that at the time the proposed judgment was forwarded to this Court on May 20, 1974, a copy was also sent to Mr. Baker, counsel for the defendant, and that the original of the judgment contains an affidavit of service of a copy of the judgment with notice of settlement sent to defendant's counsel. The Court is respectfully referred to the original judgment in the Court's files in this regard. Finally, notice of the signing of the judgment in this action was printed in accordance with custom in the New York Law Journal on May 29, 1974, on page 21 (See Exhibit "B" annexed).

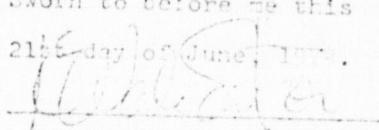
6. It is crystal clear that the defendant's attorney received all the notice to which he was entitled. It is now too late for him to move to amend the judgment under Rule 59(e).

WHEREFORE, deponent prays that the defendant's motion to amend the judgment herein be denied.


RENE H. REITACH

Sworn to before me this

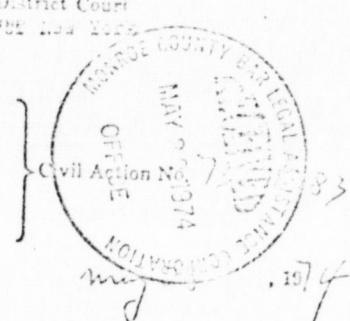
21st day of June, 1974.



K. WADE EATON
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commissioned March 29, 1972.

CLERK'S OFFICE
United States District Court
Eastern District of New York

Frost 3
Weinberger 8
There was entered on the docket
an order (judgment)



A.O. NO. 153

LEWIS ORCUTT, CLERK

Exhibit A

153

EASTERN DISTRICT

Court Notice

On motions under Rule 53(a) of the General Rules of this court relating to exceptions or objections to interrogatories. Answers to interrogatories, etc., by the clerk request that a copy of the complaint papers be submitted in addition to the original complaint papers at the time of the filing.

LEWIS ORGEL,
Clerk.

Dispositions

Chief Judge Miller
U. S. A. v. Warren Little
and James Smalveed -- On trial

Judge Constance
U. S. A. v. Anthony Zimmerman
-- On trial

Judge Fahey
U. S. A. v. Peter Varco --
trial continued

Judge Fresta
U. S. A. v. Harry Bernstein
-- On trial

Judge Weinstein
U. S. A. v. Jack Kane -- On trial

Decisions

Chief Judge Miller
Rodriguez v. U. S. At
Barney vs. manufacturer--Order
signed.

Judge Fahey
Paravano v. Bank Line,
Dill, Clutter v. City of Long
Beach--Orders signed

Judge Fahey
Bernstein v. Maireroni
Kear v. First National Bank
of Cleveland, First & Weiss v.
Turkey--Orders signed

Index No. 5100-1970

State that the within is a (certified)

copy to the other of the clerk of the within

19

MONROE COUNTY
LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT

Office and Post Office Address
80 West Main Street
ROCHESTER, NEW YORK 14614

Service of a copy of the within
is hereby admitted.

Service of a copy will be prevened
by the following:

At Court of the within named Court, at

140 19

MONROE COUNTY
LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT

Office and Post Office Address
80 West Main Street
ROCHESTER, NEW YORK 14614

Index No. 5100-1970 Year 1970
GREATER UP-STATE LAW PROJECT
MONROE COUNTY, NEW YORK

CLAUDIA TRICOT, et al., pl.

Plaintiffs,

-53-

CHARLES WILHELMUS, et al.,

Defendant.

PLAINTIFFS ATTORNEY
CHARLES WILHELMUS, et al.,
101 E. 15TH STREET, NEW YORK CITY.

MONROE COUNTY LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT

Attorney for Plaintiff.

Office and Post Office Address, Telephone
80 West Main Street
ROCHESTER, NEW YORK 14614
Tel. No. 454-6560

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Date,

Attorney(s) for

155

JDP:LHD:gp
F.732038

C
O
P
Y

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
CLAUDIA FROST, ET AL.,

Plaintiffs,

ORDER * /

-against-

Civil Action
No. 73 C 1383

CASPAR WEINBERGER, as Secretary of
the United States Department of
Health, Education and Welfare,

Defendant.

----- X

Defendant having moved this Court pursuant to Rule 59 for
an order to amend the judgment, the Court having considered the
Notice of Motion dated June 13, 1974, in support of said motion,
and the affidavit of Rene H. Reixach sworn to June 21, 1974 in
opposition to the motion, said motion having come on for argument
before this Court on June 28, 1974, and DAVID G. TRACER, United
States Attorney, by Lloyd H. Baker, Assistant United States
Attorney, having appeared in support of the motion, and Rene H.
Reixach, Esq., having appeared in opposition to the motion, now
on motion of Rene H. Reixach, it is

ORDERED that said motion be, and is hereby denied.

Dated: Brooklyn, New York
July 1, 1974

/s/ Anthony J. Travia
UNITED STATES DISTRICT JUDGE

* Retyped by Appellant due to poor copy

DEPT. 100-10
F. 752026

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

CLAUDIA PROST, ET AL., X

Plaintiffs,

-against-

NOTICE OF APPEAL

73 C 1333

CASPAR WEINBERGER, as Secretary of
the United States Department of
Health, Education and Welfare,

Defendant.

PLEASE TAKE NOTICE that the defendant hereby appeals to
the United States Court of Appeals for the Second Circuit from the
Order and Judgment of this Court dated May 28, 1974, and from each
and every part of said Order and Judgment.

Dated: Brooklyn, New York
July 17, 1974

Yours, etc.

DAVID C. TRAGER
United States Attorney
Eastern District of New York
Attorney for United States
of America
225 Cadman Plaza East
Brooklyn, New York 11201

By: *Lloyd H. Baker*
LLOYD H. BAKER
Assistant U.S. Attorney

TO:
CLERK
UNITED STATES DISTRICT COURT

SUSAN SAVITT, ESQ.
Nassau County Law Services Committee
115 North Main Street
Freeport, N.Y. 11520

RENE H. REINACH, ESQ.
Greater Up-State Law Project
Monroe County Legal Assistance Corp.
80 West Main Street
Rochester, N.Y. 14614